Supreme Court, U.S.
FILED

09-384 SEP 28 2009

OFFICE OF THE CLERK

No. 09-___

IN THE
Supreme Court of the United States

STATE OF ALASKA, OFFICE OF THE GOVERNOR,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 302 of the Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. § 2000e-16a *et seq.*, prohibits discrimination on the basis of race, sex, religion, and national origin "with respect to [the] employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e-16c(a); *see* 42 U.S.C. § 2000e-16b(a). The questions presented are:

1. Whether high-level policymaking, advisory, and personal staff chosen by a Governor can assert a First Amendment right to continued employment in such positions of trust and confidence after conducting press conferences criticizing the Governor and his actions.

2. Whether GERA unequivocally abrogates the States' sovereign immunity from suit in the absence of any explicit abrogation of immunity, textual specification of States as defendants, or express authorization of proceedings against States.

3. Whether, given the absence of any legislative or judicial record documenting a pattern of unconstitutional discrimination by States against the high-level policymaking and advisory staff of elected officials, GERA constitutes a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is the Office of the Governor of the State of Alaska, who was also the petitioner in the court of appeals.

The Equal Employment Opportunity Commission and the United States of America were respondents in the court of appeals.

Margaret G. Ward was an intervenor in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Office of the Governor of the State of Alaska, respectfully petitions for a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a) is reported at 564 F.3d 1062, and the opinion of the panel (App., *infra*, 56a) is reported at 508 F.3d 476. The decisions of the United States Equal Employment Opportunity Commission (App., *infra*, 91a) and its Administrative Law Judge (App., *infra*, 100a-137a) are not reported.

JURISDICTION

The court of appeals issued its en banc opinion on May 1, 2009. App., *infra*, 1a. On July 17, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 14, 2009, and, on September 9, 2009, Justice Kennedy further extended the time for filing to and including September 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the Appendix to the Petition, App., *infra*, 138a-146a.

STATEMENT OF THE CASE

1. Congress enacted the Government Employee Rights Act as Title III of the Civil Rights Act of 1991 ("GERA"), Pub. L. No. 102-166, 105 Stat. 1071, 1088, to "provide procedures to protect the right of Senate and other government employees" against discrimination. *Id.* § 301(b), 105 Stat. 1088.[1]

As relevant here, GERA prohibits "discrimination on the basis of race, color, religion, sex, national origin, age, or disability" in "[a]ll personnel actions affecting" specified federal and State employees. 42 U.S.C. §§ 2000e-16a(b), 2000e-16b(a). With respect to State employees, GERA's "rights, protections, and remedies" against discrimination apply to "any individual chosen or appointed, by a person elected to public office in any State or political subdivision * * * (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e-16c(a).

GERA further provides that the "remedies" for a violation of its terms "may include * * * such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d)" of Title 42 – that is, backpay and other equitable relief,

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[1] Originally codified in Title 2, GERA was reclassified in 2000 to appear at 42 U.S.C. §§ 2000e-16a to 2000e-16c.

attorney's fees, and interest, respectively. 42 U.S.C. § 2000e-16b(b)(1). GERA also authorizes "such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of [Title 42]." *Ibid.*

GERA does not allow an aggrieved employee to sue in court directly. Instead, the employee is limited to "[e]nforcement by administrative action" before the United States Equal Employment Opportunity Commission to obtain "appropriate relief." 42 U.S.C. § 2000e-16c(b)(1). The EEOC's final order may be reviewed by the regional court of appeals through a petition for review of agency action. 42 U.S.C. § 2000e-16c(c).

2. After his successful campaign for reelection in 1990, then-Alaska Governor Walter Hickel appointed Margaret Ward to be Director of the Office of the Governor in Anchorage. Her "essential" duties included "handl[ing] press conferences" and "supervis[ing] all operations of Governor[Hickel's] Anchorage Regional Office, including personnel." Pet'r C.A. App. 54-55. Governor Hickel also appointed Lydia Jones to be a Special Staff Assistant in the Governor's Anchorage office. Both positions were politically sensitive positions. App., *infra*, 57a.

In 1993, Governor Hickel and his Chief of Staff, Pat Ryan, obtained information indicating that Ward and Jones were impermissibly using State resources to assist then-Lieutenant-Governor Jack Coghill's plan to run against Governor Hickel in the gubernatorial race the following year. Governor Hickel responded by sending a memorandum to all senior staff in the Offices of the Governor and

Lieutenant-Governor advising them of the legal restrictions on staff members' campaign activities. Pat Ryan also telephoned Ward to warn her against using State resources to support a political campaign. App., *infra*, 58a.

The next day, Ward informed Ryan that Jones had submitted a memorandum charging John Hendrickson, a Special Staff Assistant in the Governor's Juneau office, with sexual harassment. Governor Hickel promptly ordered an internal investigation into the sexual harassment charge. He also ordered an investigation into the alleged misuse of State resources for political activities. *Ibid.*

The internal investigation into the allegations of sexual harassment concluded that Jones and Hendrickson had been involved in an inappropriate workplace relationship and that, if Ward (as Jones' supervisor) had been aware of that behavior, she had failed to take appropriate steps to halt it. Hendrickson received a reprimand and was required to attend corrective training on sexual harassment in the workplace. Pet'r C.A. App. 73. Ward was required to attend training on the prevention of workplace harassment. *Id.* at 75. Jones was advised of the disciplinary actions taken against Hendrickson and Ward, but was not herself disciplined. *Id.* at 76. After they were informed of the results of the harassment investigation, Ward and Jones convened a press conference in which they criticized the Governor and his handling of the harassment allegations and announced their intention to seek relief from the EEOC. App., *infra*, 58a.

Ward and Jones were placed on administrative leave, pending the results of the investigation into the allegations that they impermissibly used State resources to campaign for Lieutenant-Governor Coghill. That investigation eventually determined that Ward and Jones had engaged in wrongful electioneering and, as a result, their employment was terminated. *Ibid.*

3. In 1994, Ward and Jones filed discrimination complaints with the EEOC against the State of Alaska. Jones alleged that she was harassed on the basis of her sex while employed in the Governor's office, was paid less because of her sex and race, and was terminated in retaliation for her press conference. Ward alleged that she was discriminated against on the basis of her sex and was terminated in retaliation for public statements she made at the press conference in support of Jones' harassment claim. App., *infra,* 58a, 93a.

The claims were assigned to an EEOC Administrative Law Judge. Alaska sought summary judgment before the ALJ on the basis that, *inter alia*, the GERA claims were barred by Eleventh Amendment sovereign immunity. The ALJ denied the motion for summary judgment, but declined to rule on Alaska's sovereign immunity defense and certified that issue for appeal to the EEOC. *Id.* at 119a (Ward), 137a (Jones). On appeal, the EEOC refused to rule on the constitutionality of a statute that it is charged to administer. *Id.* at 98a. Alaska then timely petitioned the Ninth Circuit for review. *See* 42 U.S.C. § 2000e-16c(c); *see also* 28 U.S.C. § 2344.

4. A panel of the Ninth Circuit sustained Alaska's argument that the Eleventh Amendment immunized it from GERA claims. App., *infra*, 56a-90a. The court explained that "[n]othing in the record shows that a pattern of gender discrimination as to a governor's staff, advisers, and policymakers existed in 1991 when GERA was enacted." *Id.* at 64a. In the absence of such evidence, the panel held that GERA was not "a proportionate response to a widespread evil," and thus was not a proper exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment sovereign immunity. *Id.* at 65a.

5. A divided decision of the en banc court of appeals reversed. App., *infra*, 1a-55a.

a. The en banc majority first held that GERA clearly expressed Congress's intent to abrogate the States' Eleventh Amendment immunity.[2] Though GERA lacks any explicit language of abrogation and nowhere identifies the States as potential defendants in GERA enforcement proceedings, the majority nevertheless concluded that Congress's intent to

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[2] The court noted that the applicability of the Eleventh Amendment's protections to EEOC proceedings was undisputed in the case, and observed that the EEOC proceedings to which GERA subjects States "are adjudicative, much like those in *Federal Maritime Commission* [*v. South Carolina State Ports Authority*, 535 U.S. 743, 760-761 (2002)]." App., *infra*, 4a & n.2.

abrogate sovereign immunity was "'unequivocal and textual'" because one provision of GERA states that the statute's anti-discrimination protections extend to policymaking appointees on the staff of State elected officials, *id.* at 4a, and a second provision incorporates the "remedies" allowed by Section 2000e-5(g) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g). Because that Section of Title VII authorizes employees under Title VII to recover remedies from "the employer," *id.* at 5a., the majority reasoned that Congress's intent to abrogate the States' Eleventh Amendment immunity was "'unmistakably clear.'" *Ibid.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

The majority held, secondly, that GERA was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment as applied to this case because, in the majority's view, each of Ward's and Jones' claims stated an actual violation of the Fourteenth Amendment, *id.* at 7a-8a (citing *United States v. Georgia*, 546 U.S. 151 (2006));16a, and that therefore it did not have to decide whether GERA was congruent and proportional "prophylactic" legislation that prohibits conduct that is not unconstitutional, *id.* at 8a (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). With respect to Ward's claim that she was fired for conducting a press conference criticizing the Governor whose office she headed, the majority reasoned that the First Amendment protects the public statements of high-level advisory members of a Governor's staff, thereby triggering constitutional scrutiny of the Governor's decision to discharge her.

b. Judge O'Scannlain concurred in part and dissented in part. App., *infra*, 16a-33a. In his view, it was "a close question" whether GERA clearly and explicitly expressed Congress's intent to abrogate Eleventh Amendment immunity, but he ultimately concluded that "it seems * * * that Congress did express its intent." *Id.* at 17a.

Judge O'Scannlain, however, "disagree[d] entirely" with the majority's conclusion that Ward's retaliatory discharge claim stated a constitutional violation, *id.* at 18a, describing the claim as an "attempt[ ] to constitutionalize a political spat over [Ward's] loyalty to the administration of Alaska's Governor," *id.* at 22a. In Judge O'Scannlain's view, "it contravenes the spirit of *Garcetti* [*v. Ceballos*, 547 U.S. 410 (2006)] and its predecessors to hold that, even though Ward criticized the Governor on a subject of public interest the Governor cannot constitutionally fire her for disloyalty." *Id.* at 25a. Judge O'Scannlain warned that, under the en banc court's constitutional rule, "an aide to a governor who criticizes publically the governor's tax policy in a press conference" could not be fired for disloyalty. *Id.* at 27a.

Having concluded that the retaliatory discharge claim does not state an actual constitutional violation, Judge O'Scannlain addressed whether GERA reflects a congruent and proportional exercise of Congress's power under Section 5 of the Fourteenth Amendment to adopt prophylactic legislation that abrogates Eleventh Amendment immunity. App., *infra*, 28a-33a. He concluded that GERA was not proper Section 5 legislation because

Congress "made no findings regarding discrimination against state employees at the policy-making level," and the EEOC could point to "no evidence that Congress identified, as the Supreme Court has required it to do, a history and pattern of violations of the constitutional rights [by] states against high-level personal and policy-making employees." *Id.* at 30a, 32a.

c. Judge Ikuta, joined by Judges Tallman and Callahan, dissented from the majority's holding that Congress clearly and explicitly abrogated the States' sovereign immunity in GERA. App., *infra*, 33a-55a. Explaining that "abrogation by inference is not enough," the dissenters stressed that GERA (i) lacks any express language abrogating the States' Eleventh Amendment sovereign immunity; (ii) does not identify States as potential defendants; (iii) does not create a statutory scheme under which States are the only possible defendants, and thus lacks all of the indicia of abrogation recognized by this Court's precedents. *Id.* at 39a-42a. With respect to GERA's cross-reference to Title VII's remedies, the dissenters noted that this provision "deals with the types of remedies available, not with who can be sued." *Id.* at 47a. GERA, the dissent concluded, "simply define[s] what types of discriminatory conduct [a]re prohibited and which government employees could bring claims," neither of which the dissent considered sufficient to abrogate sovereign immunity clearly and explicitly. *Id.* at 42a-43a.

REASONS FOR GRANTING THE PETITION

As this Court recently explained, "federal intrusion into sensitive areas of state and local

policymaking[] imposes substantial federalism costs." *Northwest Austin Municipal Utility Dist. Number One v. Holder*, 129 S. Ct. 2504, 2511 (2009). As construed by the en banc Ninth Circuit, GERA strikes at the heart of State government's policymaking by forcing States to appear before a federal administrative agency, with federal court review, to defend against statutory and constitutional challenge every decision a Governor makes concerning the employment of his or her closest, most confidential personal and policymaking advisors. Under the Ninth Circuit's decision, moreover, Congress can now intrude into a Governor's personal staffing to that unprecedented degree without having to warn the States and their representatives directly during the legislative process. That is because the court of appeals held that the States' constitutional immunity from such intrusive suits can be abrogated without any mention of the subject in the statutory text or any identification of the States as defendants subject to suit. That ruling squarely conflicts with this Court's precedent. Because the Ninth Circuit's decision was en banc, this Court is the only forum in which Alaska and the eight other States that are governed by the Ninth Circuit's decisions can vindicate the sovereign immunity and the autonomy in selecting a Chief Executive's closest advisor that the Constitution carefully preserved for them.

I. The Court Of Appeals' Holding That The First Amendment Shields Disloyal Speech By A Governor's Closest Advisors And Policymaking Staff Defies This Court's Precedent And Creates A Circuit Conflict.

The Ninth Circuit's decision has created a new constitutional right for a Governor's closest and most confidential advisors to convene a press conference, publicly denounce the Governor, betray his trust, and still retain their highly sensitive positions on the Governor's staff. The en banc majority rested its ruling on this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). But *Garcetti* does not sweep that broadly. Indeed, in conflict with the Ninth Circuit's decision here, the Third and Fifth Circuits have construed *Garcetti* far more narrowly.

Even more significantly, the Ninth Circuit decision represents an extraordinary and unprecedented intrusion on State sovereignty and will significantly chill the ability of the States' highest officials to conduct their affairs and to obtain reliable advice from advisors of their own choosing. *Cf. Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381-382, 385 (2004). Much like *Cheney* or a court decision declaring a state law unconstitutional, the constitutional cost of the Ninth Circuit's ruling to States and to the "constitutional blueprint" of "[d]ual sovereignty" warrants certiorari review. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002).

In *Garcetti*, this Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for

First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," 547 U.S. at 421. The en banc majority's holding here that a member of a Governor's hand-picked staff – the head of the Office of the Governor – can claim a constitutional right to retain that confidential position *because* she conducted a press conference to "protest [against]" the Governor and to accuse him of "misconduct" is an unprecedented expansion of the First Amendment in conflict with this Court's precedent and the decisions of other circuits.

The en banc majority held that Ward's allegedly retaliatory discharge was elevated from a routine employee grievance to a constitutional claim solely because criticizing the Governor was an issue of public concern, and because the Court's definition of "official duties" was so narrow as to exclude the convening of press conferences complaining about the Governor, App., *infra*, 14a, even though her "essential" duties included "handl[ing] press conferences," Pet'r C.A. App. 55. Under this Court's government employee speech precedent, however, the First Amendment is not so myopic in its assessment of an employee's duties and, in fact, it does not that readily police high-level government officials (whether the President or a Governor) in choosing their trusted advisors.

First, the Ninth Circuit's analysis ignored this Court's direction that the inquiry into whether speech was made in the course of the speaker's "official duties" "is a practical one." *Garcetti*, 547 U.S. at 424. In determining that the press conference

criticizing the Governor's management of his personal staff was not part of Ward's "official duties" and thus was speech subject to constitutional protection, *id.* at 421, the court of appeals asked only whether Ward's formal duties included exposing allegations of discrimination to the public. App., *infra*, 14a. That is far too cramped a conception of "official duties." As Judge O'Scannlain explained in dissent, for members of a Governor's high-level staff, maintaining the Governor's trust in communications with the public and press is part of the individual's official duties. *Id.* at 27a. Surely, given Ward's position, if she had conducted a press conference *defending* the Governor, that would be considered part of her service to the Governor. *See* Pet'r C. A. App. 55. The First Amendment's protection, however, should not turn on and off based on whether a Governor's close advisor seeks to support or embarrass him.

Indeed, the United States would presumably agree that avoiding open public criticism and political humiliation of the President is part of the official duties of the President's Chief of Staff or the head of the Office of the President, and that the First Amendment's Free Speech Clause would not constrain or regulate a President's discharge of such a high-level staff member for disloyalty. The same rule must apply to a State's Chief Executive.

As this Court held in *Garcetti*, "Government employers, like private employers, need a significant degree of control over their employee's words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*,

547 U.S. at 418. At the high political level at which Ward worked and at which GERA exclusively operates, the need for control over speech and the risk of "impair[ing] the proper performance of governmental functions," *id.* at 419, are magnified exponentially. The Ninth Circuit fundamentally erred by excluding those considerations from the inquiry into the constitutional status (or not) of a key political staffer's speech about the State's Chief Executive. As in *Connick v. Myers*, 461 U.S. 138 (1983), it was not "necess[ary] for [the Governor] to allow events to unfold to the extent that the disruption of [his] office and the destruction of working relationships [was] manifest before taking action." *Id.* at 152.

Second, the Ninth Circuit ignored this Court's direction in *Garcetti* that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 421-422. But for her high-level position of trust and access to the Governor's internal affairs, Ward would not have obtained the information she used as ammunition at her press conference. Indeed, the very reason that Jones came to Ward is that Ward's "essential functions" included serving as the "supervis[or of] all operations of Governor[Hickel's] Anchorage Regional Office, including personnel." Pet'r C.A. App. 54.

In according Ward's special knowledge and access to information no relevance in its First Amendment analysis, the Ninth Circuit placed itself in conflict with the Third and Fifth Circuits, which hold that

employee speech based on special knowledge obtained in the course of performing the employee's job does satisfy *Garcetti's* "official duties" inquiry and takes the employee's speech outside of the First Amendment. *See Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (actions in advising and advocating for student in disciplinary proceedings unprotected by First Amendment in light of professor's position as department chair and special knowledge of disciplinary code); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007) (troopers' complaints about conditions at firing range were within job duties and not protected by First Amendment due to troopers' special knowledge and experience); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (memoranda questioning handling of school athletic funds unprotected by First Amendment in light of athletic director's special knowledge of funds and procedures relating to athletic departments); *see also Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008) ("While the First Amendment protects the right of public employees to speak out on matters of public concern," it does not require an employer to "nourish a viper in the nest") (internal quotation marks omitted), *petition for cert. pending*, No. 08-1328 (filed April 27, 2009)). This Court's review is necessary to resolve that conflict and to afford high-level state officials within the nine States composing the Ninth Circuit the same protection in employing confidential staff that is enjoyed by State officials in the remaining 41 States.

Third, this Court's review is needed more broadly to redress the substantial confusion in circuit law

concerning the scope of *Garcetti's* "official duties" inquiry. While the Ninth Circuit focused on formal job duties and the Third and Fifth Circuits looked to whether employment status provided the source of the knowledge or information, other courts of appeals have focused the inquiry on whether the employee directed the speech to supervisors or others within the relevant chain of command. *Compare Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008) (communication made to outside agency protected by First Amendment), *with Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007) (communication to superior not protected by First Amendment), *cert. denied*, 128 S. Ct. 538 (2007), and *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (same). Still others place dispositive significance on whether regulations or policies require an employee to speak. *See Morales v. Jones*, 494 F.3d 590, 597-598 (7th Cir. 2007) (speech within job duties and not protected by First Amendment where policy required officer to report all potential crimes), *cert. denied*, 128 S. Ct. 905 (2008); *Battle v. Bd. of Regents for the State of Georgia*, 468 F.3d 755, 761-762 (11th Cir. 2007) (speech within scope of duties because of federal guidelines requiring employees to report suspected wrongdoing). The need for this Court's clarification is underscored by the frequency with which the need to define the scope of "official duties" arises.[3]

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[3] The recurring nature of this issue is illustrated by the number of times it has been raised in this Court alone since

Finally, in addition to the conflicts and confusion in the circuits, the profound constitutional and federalism implications of the Ninth Circuit's decision here warrant certiorari review in their own right. *See Cheney*, 542 U.S. at 381 (review warranted in light of separation-of-powers considerations, including the need to protect "'Presidential confidentiality'" and protect against intrusions on the President's ability to perform his "constitutional duties") (citation omitted); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 488-489 (1989) (Kennedy, J., concurring) (examining extent to which legislative enactment can "interfere with the manner in which the President obtains information necessary to discharge his [Constitutional] dut[ies]"). As the United States itself has argued, court decisions restricting the ability of the President or Vice-President to select their advisors and choose those whom they place and maintain in positions of close trust are of such significant constitutional dimension as to warrant this Court's review. *See, e.g.*, Petition

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Garcetti was decided. *See Callahan v. Fermon*, 129 S. Ct. 2734 (2009); *Flipping v. Reilly*, 129 S. Ct. 1316 (2009); *Thampi v. Collier County Bd. of Comm'rs*, 129 S. Ct. 1040 (2009); *Vose v. Kliment*, 128 S. Ct. 2500 (2008); *Ibarra v. Lexington-Fayette Urban County Gov't*, 128 S. Ct. 510 (2007); *see also* Petition for a Writ of Certiorari, *Cheek v. City of Edwardsville*, No. 08-1295, 2009 WL 1070679 (scheduled for Conference on September 29, 2009); Petition for a Writ of Certiorari, *York v. Robinson*, No. 08-1462, 2009 WL 1497816 (same); Petition for a Writ of Certiorari, *Cooley v. Eng*, No. 08-1571, 2009 WL 1786470 (same).

for Writ of Certiorari, *Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367 (2004) (No. 03-475), 2003 WL 22669130 at *7-*8 (certiorari warranted because claim "would open the way for judicial supervision of internal Executive Branch deliberations" and "will routinely generate the kind of intrusions into the Executive Branch that this Court has sought to avoid"). Certainly, if concerns about intrusions on the constitutional duties of high-level federal officials are sufficient in their own right to support certiorari, then, as a matter of constitutional federalism, equivalent concerns for the ability of State Chief Executives to carry out their duties, to select their closest advisors, and to obtain advice from those whom they trust merit similar status in this Court's certiorari calculus.

Indeed, in *Gregory v. Ashcroft,* 501 U.S. 452 (1991), this Court recognized the profound implications for constitutional federalism of congressional legislation that purported to regulate "important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy" because such positions within a State "go to the heart of representative government," *id.* at 462. The en banc court of appeals' decision here, however, leaves nine States, with no chance of legal reprieve, laboring under a rule of law that renders the discharge of a Governor's closest and most confidential staff members for public disloyalty a subject of constitutional regulation by the federal courts. The implications of that decision are hard to understate. At the uniquely high level at which

GERA operates, virtually every public disclosure made by a high-level policy advisor or staff member will meet the Ninth Circuit's "issue of public concern" test, and virtually no staff member – save the press spokesperson – will be formally deputized, with the precision Ninth Circuit law now demands, with the official duty of revealing to the press the Governor's internal office affairs.

The Ninth Circuit's First Amendment ruling thus intrudes deeply into constitutional federalism by ensuring that virtually all critical public commentary by high-level advisors will be cloaked with constitutional protection. In an area where federal courts should be the most hesitant to constitutionalize employee grievances and the most vigilant about protecting legitimate State prerogatives, the Ninth Circuit's test has opened the door widely to regulation by litigation of the States' most sensitive and critical employment decisions. But "federal court is not the appropriate forum in which to review the wisdom of [a Governor's] personnel decision," particularly when it concerns the selection and retention of a Governor's most trusted advisors and staff. *Connick*, 461 U.S. at 147. Before the Ninth Circuit's significant distortion of the constitutional federal/state balance is allowed to police the employment decisions of nine Governors and other high-level state officials, this Court's review should be afforded.

II. The Ninth Circuit's Holding That GERA Abrogates The States' Sovereign Immunity Squarely Conflicts With This Court's Precedent.

1. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Gregory*, 501 U.S. at 457 (quoting *Texas v White*, 7 Wall. 700, 725 (1869)). Because of the "fundamental nature of the interests implicated by the Eleventh Amendment," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), and "the vital role of the doctrine of sovereign immunity in our federal system," *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984), Congress may abrogate the States' constitutionally secured immunity from suit "only by making its intention unmistakably clear in the language of the statute," *Atascadero*, 473 U.S. at 242. The test is a "stringent" one, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), because courts, as a matter of judicial restraint, will not lightly impute to Congress an intent to "upset the usual constitutional balance of federal and state powers," *Gregory*, 501 U.S. at 460.

To effect a sufficiently clear abrogation of sovereign immunity, this Court's precedents have required Congress to take one of three paths.

First, Congress may explicitly abrogate the States' Eleventh Amendment or sovereign immunity. *See, e.g., United States v. Georgia*, 546 U.S. 151, 153 (2006) (under Americans with Disabilities Act, 42 U.S.C. § 12202, "[a] State shall not be immune under

the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 635 (1999) (Patent Remedy Act, 35 U.S.C. § 296(a), provides that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit").

Second, Congress may create a statutory scheme under which States are the only possible defendants. *See, e.g., Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 57 (1996).

Third, Congress may specifically define States as potential defendants who are subject to suit. *See, e.g., Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726 (2003) (Family and Medical Leave Act, 29 U.S.C. § 2617, expressly allows a suit against a "public agency," defined to include both "the government of a State" and "any agency of . . . a State"); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (Age Discrimination in Employment Act allows suit against a "public agency," which is specifically defined to include "the government of a State").

GERA satisfies none of this Court's tests. First, GERA nowhere mentions, let alone expressly abrogates, Eleventh Amendment or sovereign immunity. Nor does GERA incorporate by reference any other provision of law explicitly abrogating the States' immunity.

Second, States are not the only possible defendants under GERA. To the contrary, the original legislative impetus for GERA was to subject federal governmental entities to suit. Pub. L. No. 102-166, § 302, 105 Stat. 1088; 42 U.S.C. § 2000e-16b(a). In addition, GERA authorizes claims against political subdivisions of States, such as counties and municipalities, 42 U.S.C. § 2000e-16c(a), which do not enjoy the Eleventh Amendment's protection of sovereign immunity. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

Finally, and critically, nothing in GERA specifically defines the States as potential defendants or subjects them to suit. As the dissenting judges below noted, "GERA contains no express definition of the individuals and entities subject to claims under its provisions." App., *infra*, 42a. To the contrary, the operative provisions of GERA that were in effect in 1994 when this suit was filed (as now) simply (i) identify which high-level and policymaking government employees are covered, *compare* 2 U.S.C. § 1220(a) (1994), *with* 42 U.S.C. § 2000e-16c(a) (2006); (ii) guarantee their right to be free of discrimination, *compare* 2 U.S.C. § 1202 (1994), *with* 42 U.S.C. § 2000e-16b(a) (2006); and (iii) authorize them to seek "appropriate" "[r]emedies," *compare* 2 U.S.C. § 1207(h) (1994), *with* 42 U.S.C. § 2000e-16b(b) (2006). Nowhere does the statute say that States, as opposed to the federal or local governments, are proper defendants, are subject to suit, or are an "appropriate" source of the authorized "remedies."

Even more tellingly, at the time GERA was enacted, Congress did not contemplate, let alone authorize, private individuals suing States in federal court at all, which is the historic core of the Eleventh Amendment. Quite the opposite, GERA's statutory scheme ensured that States would *not* be subject to suit in federal court at the behest of private individuals by mandating that GERA's rights be enforced through administrative action before the EEOC. 42 U.S.C. § 2000e-16c(b). Subsequent judicial review, moreover, is limited to the filing of a petition for administrative review, 42 U.S.C. § 2000e-16c(c), which renders the United States a party to the litigation, thereby vitiating the Eleventh Amendment's application, *see, e.g., Alden v. Maine*, 527 U.S. 706, 755-756 (1999); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

There is no indication that, at the time GERA was enacted, Congress regarded GERA's administrative enforcement scheme as implicating the States' sovereign immunity. To be sure, this Court held a decade *after* GERA's enactment that the States' sovereign immunity under the Eleventh Amendment extends to administrative proceedings like those authorized by GERA, *Federal Maritime Commission, supra*, but there is no evidence that Congress in 1991 anticipated this Court's decision in *Federal Maritime Commission* or otherwise considered it necessary to undertake the sensitive constitutional weighing involved in legislatively abrogating the States' constitutionally based immunity from suit to enact its administrative relief scheme.

Thus, far from containing any clear or explicit abrogation of sovereign immunity, GERA's text points in the opposite direction. States are nowhere identified as defendants and are nowhere subject to the type of suits that triggered the Eleventh Amendment's protection under this Court's precedent at the time Congress acted. In fact, GERA's remedial design strongly suggests that Congress sought to avoid the necessity of abrogating immunity by foreclosing direct judicial enforcement without the presence of the United States as a party. The court of appeals thus fundamentally departed from this Court's precedent by making the abrogation decision for Congress without explicit textual direction. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

2. The Ninth Circuit majority reasoned that GERA's cross-reference to Title VII's provision entitling aggrieved employees to "back-pay * * * payable by the employer" was an "unmistakabl[e] express[ion of] Congress's intent to allow suits against States for damages." App., *infra*, 7a. That analysis defies this Court's precedent. Having never identified States as potential defendants, that "general authorization" for recovery of a particular type of *remedy* "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero*, 473 U.S. at 246.

At best, the cross-reference might support an "inference that the States were intended to be subject to damages actions for violations of the [GERA]." *Dellmuth*, 491 U.S. at 232. That is not enough. *See, e.g., id.* at 232 ("permissible inference" is not "the unequivocal declaration which * * * is necessary before [this Court] will determine that Congress intended to exercise its powers of abrogation"); *Atascadero*, 473 U.S. at 242 (abrogation by inference rejected because it would "temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court").

Contrary to the majority's ruling (App., *infra*, 6a-7a), this Court's decisions in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), actually underscore the error in the court of appeals' decision. The Age Discrimination in Employment Act at issue in *Kimel* and the Family and Medical Leave Act at issue in *Hibbs* both contain or incorporate statutory provisions that specifically authorize not just a remedy, but a lawsuit to obtain that remedy, against the government of a State. *See Kimel*, 528 U.S. at 73-74; *Hibbs*, 538 U.S. at 726.

Because the court of appeals' decision was en banc, absent this Court's review, the nine sovereign States within the Ninth Circuit will have been stripped of the protection of their sovereign immunity that the Constitution and this Court's precedent demand. Moreover, they will be left on a lesser footing than their sister States in the other federal

circuits who have hewed to this Court's abrogation precedent by requiring explicit abrogation, express identification of States as defendants to suit, or the existence of a scheme in which States are the only potential defendants. *See, e.g., Nelson v. La Crosse County Dist. Att'y*, 301 F.3d 820, 828 (7th Cir. 2002) (section 106(a) of Bankruptcy Code stating that "sovereign immunity is abrogated" expresses a clear statement of congressional intent to abrogate sovereign immunity); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 819 (6th Cir. 2000) (Equal Pay Act clearly expresses congressional intent to abrogate state sovereign immunity by incorporating provision of Fair Labor Standards Act allowing lawsuit against "the government of a State"). The protection of sovereign immunity and the principles of judicial restraint embodied in this Court's clear statement rule should not vary based on geography, and the en banc Ninth Circuit's decision so starkly conflicts with this Court's precedent as to warrant certiorari review.

III. GERA Exceeds Congress's Power Under Section 5 Of The Fourteenth Amendment.

GERA regulates exclusively the employment of close policy, advisory, and confidential staff of high-level government officials. When Congress chooses to adopt prophylactic legislation that operates at the apex of federalism concerns as GERA does, its constitutional obligation to establish the necessity and appropriateness of that intrusion is at its pinnacle. Yet, as Judge O'Scannlain explained in dissent, the record justifying GERA could not be more barren. Having made the decision when

enacting Title VII that there was no pressing need for federal regulation of such employment positions, *see Gregory, supra*; App., *infra*, 31a-32a (O'Scannlain, J., dissenting), Congress reversed course in 1991 and passed GERA to regulate at the federal level the employment and retention of some of a State's most sensitive policymaking positions. In doing so, however, Congress "made no findings" – none – "regarding discrimination against state employees at the policy-making level." App., *infra*, 30a. Nor has the EEOC identified any "history and pattern of violations of the constitutional rights [by] the states against high-level personal and policy-making employees." *Id.* at 32a. GERA, in other words, is a Section 5 solution without a constitutional problem to remediate. That fails at every level this Court's test for appropriate Section 5 legislation. *See, e.g., Kimel, supra; City of Boerne v. Flores*, 521 U.S. 507 (1997).

To be sure, GERA suits against States have not arisen with great frequency. But that simply underscores the lack of a problem justifying the intrusion and the lack of constitutional justification for the chill GERA casts over the day-to-day employment decisions of all fifty States' highest-level officials. In short, "[t]he substantial costs" that GERA "exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general [sovereignty] power, far exceed any pattern or practice of unconstitutional conduct," *Boerne*, 521 U.S. at 534,

and this Court should grant review to restore the proper constitutional balance.[4]

* * * * *

"The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Gregory*, 501 U.S. at 458 (internal citations omitted). The divided decision of the en banc Ninth Circuit in this case has profoundly unsettled that balance and, for the States within the Ninth Circuit, only action by this Court can restore their constitutional sovereignty. Decisions of the federalism magnitude and consequence rendered by the court of appeals in this case merit this Court's review because the States' sovereignty ought not to be dependent on circuit boundary lines.

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[4] As the Ninth Circuit acknowledged, Ms. Ward is not seeking relief directly under the First Amendment. App., *infra*, 12a n.6. Instead, she seeks relief under GERA on the theory that GERA provides a cause of action for anyone who is retaliated against for exercising GERA rights. *Ibid.* By holding that Ward's claim stated a direct violation of the Constitution, the Ninth Circuit majority forewent any analysis of Congress's authority to subject the States to such intrusive regulation. Because Judge O'Scannlain addressed the issue in dissent, as did the panel decision of the Ninth Circuit, the question is properly before this Court. Indeed, it is an indispensable component of determining whether Alaska's sovereign immunity was properly abrogated, an issue that is properly resolved on interlocutory review. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 28, 2009

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals,
Ninth Circuit.

State of ALASKA, Office of the Governor, Petitioner,

v.

EEOC; United States of America, Respondents,
Margaret G. Ward, Intervenor.

No. 07-70174.

Argued and Submitted Sept. 24, 2008.
Filed May 1, 2009.

On Petition for Review of an Order of the Equal Employment Opportunity Commission. Agency Nos. 11A40004 & 11A40005.

Before ALEX KOZINSKI, Chief Judge, MARY M. SCHROEDER, DIARMUID F. O'SCANNLAIN, SIDNEY R. THOMAS, BARRY G. SILVERMAN, KIM McLANE WARDLAW, MARSHA S. BERZON, RICHARD C. TALLMAN, CONSUELO M. CALLAHAN, MILAN D. SMITH, JR. and SANDRA S. IKUTA, Circuit Judges.

Opinion by Chief Judge Kozinski; Partial Concurrence and Partial Dissent by Judge O'Scannlain; Dissent by Judge Ikuta.

KOZINSKI, Chief Judge:

We must decide whether states have Eleventh Amendment immunity from claims under the Government Employee Rights Act of 1991 (GERA).

Facts

Lydia Jones and Margaret Ward worked in the office of then-Governor Walter Hickel of Alaska. Both were fired under disputed circumstances and filed complaints with the Equal Employment Opportunity Commission. Jones alleged that she was paid less because she is a black woman, sexually harassed and then retaliated against for complaining about the harassment. Ward alleged that she was paid less on account of her sex and that she was terminated because of statements she made supporting Jones's complaint.

The EEOC assigned the cases to an administrative law judge. Before the ALJ, Alaska argued that Jones and Ward's claims were barred by sovereign immunity. The ALJ disagreed. On interlocutory appeal, the EEOC denied the sovereign immunity defense and remanded for further proceedings. The state petitions for review of the EEOC's decision.[1]

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[1] A remand order is not a final agency decision, and so would not normally fall within our jurisdiction. Because this remand order turns on a claim of sovereign immunity, however, a version of the collateral order doctrine provides a basis for our jurisdiction here. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *P.R. Aqueduct &*

Analysis

The Eleventh Amendment protects states from being sued without their consent. This immunity applies by its terms to the judicial power, but the Supreme Court has held that some administrative proceedings sufficiently resemble civil actions to be circumscribed as well. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760-61, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). The contours of that principle aren't completely clear, but the parties seem to agree that EEOC proceedings are sufficiently court-like to implicate the Eleventh Amendment. We

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Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) ("States ... may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity."). Although the collateral order doctrine is understood as a "construction" of 28 U.S.C. § 1291, *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (internal citation omitted), it is also applicable by analogy in the context of non-final agency determinations that meet the standards articulated in *Cohen*. *See, e.g., Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980); *Meredith v. Fed. Mine Safety & Health Rev. Comm'n*, 177 F.3d 1042, 1050 (D.C.Cir.1999). Because the EEOC's remand order turns on Alaska's claim of sovereign immunity, and because it otherwise meets *Cohen*'s requirements-it is "conclusive ... [and] resolve[s an] important question[ ] completely separate from the merits ... [that would be] effectively unreviewable on appeal from final judgment in the underlying action," *Digital*, 511 U.S. at 867, 114 S.Ct. 1992-we may review it.

assume, without deciding, that this is true.[2]

Congress may abrogate this immunity in certain circumstances. To determine when it has validly done so, we must "resolve two predicate questions: ... whether Congress unequivocally expressed its intent to abrogate" and, if so, "whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

1. Congress's intent to abrogate sovereign immunity in the Government Employee Rights Act is both "unequivocal and textual." *Dellmuth v. Muth,* 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989); *see also Atascadero v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). As its title suggests, the statute is designed to give rights to government employees, including state employees, against their employers. The act amended Title VII to extend coverage of its employment discrimination provisions to such government employees: "[A]ny individual chosen or appointed, by a person elected to public office in any State ... to be a member of the elected official's personal staff," as Jones and Ward were, has rights under GERA to a workplace "free

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[2] We have independently determined that this assumption is plausible. State government employees who file a claim with the EEOC are subject to procedures that are quite different from those applicable to claims against private employers. *Compare* 29 C.F.R. Part 1603 *with* 29 C.F.R. Part 1601. The latter procedures are similar to mediation, whereas the former are adjudicative, much like those in *Federal Maritime Commission.*

from any discrimination based on ... race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-16c(a)(1), 2000e-16b(a)(1). GERA authorizes the EEOC to order remedies for violations of these rights, 42 U.S.C. § 2000e-16c(b)(1), including "back pay (payable *by the employer* ... responsible for the unlawful employment practice)." 42 U.S.C. § 2000e-16b(b)(1), cross-referencing 42 U.S.C. § 2000e-5(g) (emphasis added).

A "general authorization for suit in federal court" is an insufficient expression of congressional intent to abrogate state sovereign immunity, *Atascadero,* 473 U.S. at 246, 105 S.Ct. 3142, as are inferences from legislative history and statutory purpose, *Dellmuth,* 491 U.S. at 230, 232, 109 S.Ct. 2397. But *Dellmuth* and *Atascadero* "do[ ] not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth,* 491 U.S. at 233, 109 S.Ct. 2397 (Scalia, J. concurring).[3] GERA's text makes congressional intent to abrogate state sovereign immunity "unmistakably clear." *Atascadero,* 473 U.S. at 242, 105 S.Ct. 3142. GERA expressly covers state employees, and expressly gives them a right to collect damages "payable *by the employer*"-the state. 42 U.S.C. §

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[3] As the fifth vote in the majority, Justice Scalia's view as to the meaning of the Court's opinion (as expressed in his concurrence) is entitled to substantial, if not controlling, weight.

2000e-5(g)(1) (emphasis added).

The only way Congress could have been clearer would have been to say "this act abrogates state sovereign immunity." But the Supreme Court has made it quite plain that such magic words are unnecessary. Twice it has considered statutes with provisions like GERA's-giving employees a cause of action for damages, and separately providing that state employers will pay-and twice it concluded that the statutes adequately expressed Congress's intent to abrogate state sovereign immunity, even though neither statute includes the terms "abrogate," "state sovereign immunity" or "Eleventh Amendment." *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), considered the Age Discrimination in Employment Act (ADEA). One section of the ADEA incorporates an enforcement provision from a separate statute, the Fair Labor Standards Act (FLSA), "authoriz[ing] employees to maintain actions for backpay 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.' " 528 U.S. at 67-68, 73-74, 120 S.Ct. 631 (quoting 29 U.S.C. § 216(b), as cross-referenced in 29 U.S.C. § 626(b)). A separate section of the FLSA defines "public agency" to include "the government of a State or political subdivision thereof." *Id.* at 74, 120 S.Ct. 631 (quoting 29 U.S.C. § 203(x)). The Court held that "[r]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees," *id.* at 74, 120 S.Ct. 631, explaining that "our cases have never required that Congress make its clear statement in a single section or in statutory

provisions enacted at the same time," *id.* at 76, 120 S.Ct. 631.

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), likewise held that provisions of the Family and Medical Leave Act (FMLA) unequivocally expressed Congress's intent to abrogate state sovereign immunity. Like the ADEA, the FMLA authorizes suits against employers, and incorporates a definition of employers that includes public agencies, and a definition of public agencies that includes states, but doesn't refer to state sovereign immunity or the Eleventh Amendment. GERA is cut from the same cloth as the ADEA and the FMLA; its reference to states as potential defendants who must answer in damages is as clear, and its focus on government employers sharper, than in these two other statutes. GERA's provisions, entitling state employees to "back pay ... payable by the employer," 42 U.S.C. §§ 2000e-5(g)(1), 2000e-16c, unmistakably express Congress's intent to allow suits against states for damages. As in *Kimel* and *Hibbs,* "[t]he clarity of Congress' intent here is not fairly debatable." *Hibbs,* 538 U.S. at 726, 123 S.Ct. 1972. The remaining question, to which we now turn, is whether Congress had the authority to do what it intended.

2. Section 5 of the Fourteenth Amendment empowers Congress to "enforce, by appropriate legislation, the provisions of" that article, and state sovereign immunity may be abrogated in service of this goal. There are two ways in which Congress can do this. First, Congress may prohibit and provide a remedy for conduct that actually violates the

Amendment. *E.g., United States v. Georgia,* 546 U.S. 151, 158, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (upholding a prohibition against cruel and unusual treatment of prisoners). Second, legislation "which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne v. Flores,* 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). We refer to the latter kind of legislation as prophylactic, and it must satisfy certain strict requirements designed to ensure that Congress doesn't substantively redefine the Fourteenth Amendment's guarantees. Before we can uphold prophylactic legislation, we must be convinced that it is congruent and proportional to the harm that Congress sought to prevent, and we often examine legislative findings as part of that inquiry. *Id.* at 520, 117 S.Ct. 2157. But the congruence and proportionality requirement applies only to prophylactic legislation; it doesn't apply to a direct remedy for unconstitutional conduct.

We therefore consider first whether Jones and Ward allege actual violations of the Fourteenth Amendment by the State of Alaska. If they do, we needn't decide whether GERA is valid prophylactic legislation. As *Georgia* indicates by its method, *see* 546 U.S. at 158-60, 126 S.Ct. 877, when legislation provides a direct remedy for unconstitutional conduct, the *Boerne* inquiry is superfluous. The merits of these claims (and Alaska's various defenses) aren't before us; we consider only whether each claim alleges conduct that, if it occurred and

wasn't justified by a valid defense, would have violated the Fourteenth Amendment.

a. This inquiry is straightforward for Jones and Ward's pay discrimination claims. Jones alleges that she was "paid less than [her] male counterparts" by the Governor's Office, and that "this was intentionally imposed due to[her] sex, female and [her] race, black." Ward alleges that the Governor "treated [her] differently than [her] counterparts due to [her] sex, female," specifically by paying her less than a male counterpart. Intentional race discrimination violates equal protection unless narrowly tailored to serve a compelling state interest. *See Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Disparate treatment on the basis of sex requires an "exceedingly persuasive justification." *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The state has claimed no such interest or justification, and we'd be hard-pressed to figure out what it might be. The alleged pay discrimination, if it happened, denied Jones and Ward equal protection of the law.

b. We next consider Jones's allegations of workplace harassment. She alleges that she was "the butt of sexual jokes" and "unsolicited physical contact." According to her complaint, one of the Governor's top deputies approached her from behind and placed his hand between her legs and, on a separate occasion, approached her as if to grab her breasts. Jones further alleges that she was retaliated against "for filing a ... complaint of sexual h[a]rassment."

While the Supreme Court hasn't specifically considered whether sexual harassment of a governmental employee can violate the Equal Protection Clause, several of our sister circuits have concluded that it can, and we agree. *See, e.g., Southard v. Texas Bd. of Criminal Justice,* 114 F.3d 539, 550 (5th Cir.1997) ("[S]exual harassment in public employment violate[s] the Equal Protection Clause of the Fourteenth Amendment.") (collecting cases); *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1478 (3d Cir.1990) (sustaining section 1983 liability for sexual harassment); *Bohen v. City of East Chicago,* 799 F.2d 1180, 1185 (7th Cir.1986) ("[S]exual harassment by a state employer ... constitutes sex discrimination in violation of the equal protection clause.").

Because the suit is against Alaska, not the man who allegedly harassed Jones, we must consider whether Jones alleged that the state violated her Equal Protection rights. Jones cannot make such an allegation under a theory of respondeat superior; she must allege that Alaska has intentionally discriminated against her. *Davis,* 426 U.S. at 239, 96 S.Ct. 2040; *see also Andrews,* 895 F.2d at 1480. While Jones has not alleged that the Governor's Office intentionally discriminated against her through an official policy promoting sexual harassment, the office may nevertheless have violated the Equal Protection Clause by intentionally refusing to redress the sexual harassment of Jones by another

employee.[4] *See Bohen,* 799 F.2d at 1187 (holding that a government employee can make "a claim of sexual harassment under the equal protection clause" by "showing that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amounted to intentional discrimination").

Jones alleges that she reported the sexual harassment, and that the Governor's Office responded by punishing her, rather than disciplining her harasser. This alleged conduct, if true, would constitute intentional sexual discrimination by the state. Jones need not allege that other state employees were harassed as well, or that the Governor's Office routinely failed to respond to such harassment, to make out an Equal Protection claim. *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Bohen,* 799 F.2d at 1186-87 ("[A] single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes. An equal protection plaintiff therefore need not prove a discriminatory policy against an entire class; discrimination against the plaintiff because of

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[4] We need not and do not decide whether other types of sexual harassment claims brought against governmental entities under Title VII or GERA also state violations of the Equal Protection Clause. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) (discussing types of sexual harassment claims that can be brought against employers under Title VII); O'Scannlain concurrence at 1072-73.

her membership in the class is by itself enough.") (citations omitted).

c. Finally, we consider Ward's claim of retaliatory discharge. Unlike the pay disparity and sexual harassment claims, this claim doesn't allege differential treatment because of race or sex. Rather, Ward complains that she was punished for speaking up about the harassment of Jones. The Fourteenth Amendment's Due Process Clause incorporates the First Amendment's free speech guarantees, so if Ward has alleged conduct that would violate the First Amendment,[5] then GERA abrogates state immunity as to that claim as well.[6]

Ward alleges that, after she was interviewed at work regarding Jones's sexual harassment charge, she received phone calls threatening termination "if [she] did not back off." Ward instead held a press conference, publicly supporting Jones's allegations of sexual harassment in the Governor's Office. The Governor's Office then placed Ward on leave while it

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[5] As Jones's retaliatory discharge claim alleges conduct that would violate the Equal Protection clause, we do not consider whether it also alleges conduct that would violate the First Amendment.

[6] Ward is not seeking relief directly under the First Amendment, just as she and Jones are not seeking relief for discriminatory treatment under the Fourteenth. The relief Ward seeks is under GERA and her theory, as we understand it, is that she was retaliated against for exercising her GERA rights and that this is itself a GERA violation. Whether this is true is a matter to be answered by the EEOC in the first instance; we express no view.

investigated her "participation in [the] March 9, 1994, press conference, and whether, through that participation, [she] breached [her] duty of loyalty to[her] employer." At the close of the investigation, Ward was terminated.

The First Amendment prohibits state retaliation against a public employee for speech made as a citizen on a matter of public concern. *Connick v. Myers,* 461 U.S. 138, 146-47, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). We have held that complaints of sexual harassment can constitute such speech. *Freitag v. Ayers,* 468 F.3d 528, 545 (9th Cir.2006); *see also Connick,* 461 U.S. at 148 n. 8, 103 S.Ct. 1684 (racial discrimination in a public workplace is "a matter inherently of public concern"). Ward was alleging misconduct in the Governor's Office: mistreatment of some Alaskans because of race and sex. The allegations were made publicly, as well as through internal channels, and received press coverage. The allegations could have affected the gubernatorial race and had far-reaching effects on Alaskan politics; the public interest in such allegations is plain. The Governor's Office has admitted that it placed Ward on leave and began the investigation that led to her firing because of Ward's public statements: "Following that press conference,[Ward was] placed on paid, administrative leave because [her] conduct was contrary to the Governor's interests and because we wanted [her] out of the office so that we could conduct an unimpeded investigation."

That Ward's statements arose out of Jones's employment grievance doesn't mean Ward wasn't speaking as a citizen on a matter of public concern.

Unlike the employee in *Connick,* Ward was not speaking about her "personal employment dispute," nor were her comments directed solely at coworkers. 461 U.S. at 148 n. 8, 103 S.Ct. 1684. Rather, Ward held a press conference to protest what she saw as sex discrimination in the Governor's Office. The Supreme Court has held that such public criticism by government employees of their employers is protected speech. *Pickering v. Bd. of Ed.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *see Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); O'Scannlain dissent at 1074-75. But Ward's official duties didn't require her to complain about the conditions of Jones's employment, or to bring the alleged sexual harassment to the public's attention.[7] *Cf. Garcetti,*

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[7] Judge O'Scannlain argues that an aide to a high-ranking official has no First Amendment right to air his policy differences with the administration. O'Scannlain dissent at 1075-76. We needn't consider this interesting hypothetical, because, as the first part of Judge O'Scannlain's opinion ably explains, "although states can ... adopt policies that treat women differently ... they do not often ... adopt policies to harass women sexually." *Id.* at 1072. It's a bit like saying that, when an employee discloses that the Governor is taking bribes, the employee is airing his differences with the official policy of

547 U.S. at 421, 126 S.Ct. 1951 ("[Complainant] wrote his .... memo because that is part of what he ... was employed to do."). Her speech at the press conference was her own. *Cf. Pleasant Grove City v. Summum,* 129 S.Ct. 1125, 1133, 1134, 172 L.Ed.2d 853 (2009) (government speech is financed, commissioned or controlled by the government). Because retaliation for this kind of speech violates the First Amendment as incorporated into the Due Process Clause, Congress has the power to provide a private remedy for it. *Georgia,* 546 U.S. at 158, 126 S.Ct. 877.

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accepting bribes. Ward was exposing the office's alleged illegal practice of tolerating sexual harassment; such criticisms can certainly be the basis for a First Amendment claim. *See Johnson v. Multnomah County,* 48 F.3d 420, 425-26 (9th Cir.1995) (government employee retaliated against for publicly accusing her boss of running a "good old boy network" can bring a First Amendment claim). Whether Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest is not at issue here. We are not deciding whether Ward should prevail on her First Amendment claim; we merely hold that it *is* a First Amendment claim. *See Eng v. Cooley,* 552 F.3d 1062, 1070-72 (9th Cir.2009) (to make a First Amendment retaliation claim, government employee must allege that the speech addressed an issue of public concern, was spoken in the employee's capacity as a private citizen and that the employer took adverse action against the employee because of the speech; burden then shifts to the government to show that its legitimate administrative interests outweigh the employee's First Amendment rights or that the adverse action would have been taken absent the speech).

Conclusion

Each of Jones and Ward's claims allege actual violations of the Fourteenth Amendment. GERA has validly abrogated Alaska's sovereign immunity with respect to these claims. The petition for review is therefore denied and the case is remanded to the EEOC for further proceedings.

DENIED.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

Although I agree with the court's determination that the allegations of sex discrimination, if true, would establish that the State of Alaska, through its Governor's Office, violated the Constitution's Equal Protection Clause, I do not think the same can be said for the allegation of retaliatory discharge in violation of the First Amendment. In my view, that claim does not state an actual constitutional violation. We must therefore analyze the statute under which the claim is made, the Government Employee Rights Act of 1991 ("GERA"), to determine whether it is valid prophylactic legislation under section 5 of the Fourteenth Amendment. *See generally City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). I believe GERA fails such scrutiny. With respect, I must dissent from the court's opinion insofar as it holds that Alaska's sovereign immunity does not preclude the claim of

retaliatory discharge.

I

Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. Const. amend. XIV, § 5. As the majority correctly explains, in order for Congress to abrogate state sovereign immunity pursuant to this enforcement power, it must "unequivocally express[ ] its intent to abrogate that immunity" and "act[ ] pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Although I believe it to be a close question, and Judge Ikuta's conscientious dissent to the contrary notwithstanding, it seems to me that Congress did express its intent to abrogate sovereign immunity in the GERA. With respect to the second requirement, Congress acts pursuant to a valid grant of constitutional authority if it either passes so-called "prophylactic legislation" or enacts remedies for actual violations of the Constitution. For "purportedly prophylactic legislation [to] constitute [ ] appropriate remedial legislation, ... 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Kimel,* 528 U.S. at 81, 120 S.Ct. 631 (quoting *Boerne,* 521 U.S. at 520, 117 S.Ct. 2157). Actual remedial laws, as the majority points out, do not have to meet this test. *See United States v. Georgia,* 546 U.S. 151, 158, 126 S.Ct. 877, 163

L.Ed.2d 650 (2006) ("[N]o one doubts that § 5 grants Congress the power to enforce the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions." (internal quotations marks and alteration omitted)).

A crucial threshold question, then, is whether a given claim against a state alleges conduct that would violate the Fourteenth Amendment to the Constitution. The allegations of pay discrimination state straightforward violations of the Equal Protection Clause, and I join the majority's opinion on that issue in its entirety. With respect to the claim of sex discrimination stemming from Jones' sexual harassment complaint, I concur in the result but remain wary of some of the majority's reasoning. Finally, I must disagree entirely with the majority's analysis of the purported First Amendment claim of retaliatory discharge, an analysis that wrongly enlarges the constitutional implications of employment decisions at the highest levels of state government.

A

While I agree with the majority's conclusion regarding the so-called sexual harassment issue, I wish to clarify that I read the majority opinion to hold no more than that it would violate the Equal Protection Clause if a state deliberately refused to protect its female employees from sexual harassment. In other words, it is not the sexual harassment that Jones allegedly suffered, as such, that generates her constitutional claim. After all, she

does not claim that the State of Alaska, through the official acts of its agents, sexually harassed her. Rather, the constitutional claim properly rests on Jones's allegation that the Governor's Office, an arm of the State, responded to her formal complaint of sexual harassment by firing her.

It is worth pausing to consider this claim carefully, for it is not the ordinary instance of unconstitutional discrimination. In most suits against a state where sexual harassment is involved, it will make more sense to characterize the claim not as one for sexual harassment "but as a claim of failure to protect against such harassment." *Bohen v. City of East Chicago,* 799 F.2d, 1180, 1189 (7th Cir.1986) (Posner, J., concurring). This is because, although states can pass laws or adopt policies that treat women differently in hiring, pay, or other official emoluments of employment, they do not often pass laws or adopt policies to harass women sexually. However, "[i]f a state or city deliberately refused to provide police protection for women, it would be violating the equal protection clause" regardless of whether those who harassed them were state actors. *Id.* at 1190. In order for such a claim to succeed, there would have to be "a policy of nonresponse to complaints of harassment, or an authoritative decision not to respond." *Id.* In view of these considerations, I understand the majority to hold that Alaska's "authoritative decision not to respond" to Jones' formal complaint, but to fire her instead, if that is what happened, violated the Equal Protection Clause.

The logical corollary to this holding is that sexual harassment, as such, does not ordinarily

violate the Equal Protection Clause.[1] This is because discrimination can only violate equal protection if it is *intentional* and *done by the state. Cf. Washington v. Davis,* 426 U.S. 229, 238-45, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (holding that evidence of discriminatory intent is necessary to make out an equal protection violation assuming the government action is neutral on its face). The actions of the Governor's aide in this case would not bring liability on Alaska unless the state officially sanctioned them. As the majority recognizes, the Constitution cannot support liability against the state for constitutional torts on the agency law theory of *respondeat superior.* Maj. Op. at 1070.

Thus, there is a crucial limitation to the majority's statement that sexual harassment *can* state a violation of the Equal Protection Clause, *see* Maj. Op. at 1069. This possibility is limited by the bedrock constitutional principle I have discussed: sexual harassment *will* state a violation *only* where there is intentional discrimination by the state.

I dwell on this caveat in order to emphasize that, without it, we would constitutionalize the type of claim employees might bring under Title VII. Such a result would be directly contrary to Supreme Court

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[1] I hasten to add that the conduct Jones complained of is outrageous and unsavory; I do not mean to condone it in any way. At the same time, we should acknowledge that the State of Alaska has not conceded the truth of the allegations either of Jones or of Ward. Indeed, there seems to be vigorous dispute about the facts underlying their dismissal from the Governor's Office.

precedent. *See Davis,* 426 U.S. at 239, 96 S.Ct. 2040 ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."). And the cases from sister circuits on which the majority relies followed the Court's guidance. As the majority opinion stated in *Bohen,* "the ultimate inquiry," where someone alleges sexual harassment *as a violation of equal protection,* "is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the condition of the victim's employment." *Bohen,* 799 F.2d at 1187.

Thus, I agree with the majority that Jones' claim-that the Governor's Office fired her rather than respond to her complaint of sexual harassment-states a violation of the Equal Protection Clause. But it is not the alleged sexual harassment but rather the "authoritative decision not to respond," *Bohen,* 799 F.2d at 1190, that justifies such conclusion.

B

Turning now to Ward's allegation of retaliatory discharge in violation of the First Amendment, as incorporated against the states through the Fourteenth, I note that, at oral argument, counsel for Ward admitted that his client's actual, First Amendment claim under the relevant case law was a "tough" one to make out. No wonder. This case, it seems to me, is a prototypical example of an

employee's attempt to "constitutionalize [an] employee grievance," a practice that the Supreme Court has explicitly discouraged. *See Connick v. Myers,* 461 U.S. 138, 154, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). But it goes farther even than that, for Ward attempts to constitutionalize a political spat over her loyalty to the administration of Alaska's Governor. With respect, the majority's approval of Ward's novel theory opens up a new frontier in this area of constitutional law, which, I believe, contravenes the spirit, if not the letter, of the Supreme Court's decisions on the subject.

1

In general, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). This is because the "government as employer indeed has far broader powers than does the government as sovereign." *Id.* (quoting *Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion)). The reason the government would violate the First Amendment at all by firing one of its employees on account of what he or she said is that employees, as citizens, "retain the prospect of constitutional protection for their contributions to the civic discourse." *Id.* at 422, 126 S.Ct. 1951. It is thus necessarily within that context that we apply the doctrinal test for whether a public employee has alleged a First Amendment violation for retaliatory discharge.

Such test has two parts. First, unless "the employee spoke as a citizen on a matter of public concern[,] .... the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* at 418, 126 S.Ct. 1951. Only if the employee passes this threshold does "the *possibility* of a First Amendment claim arise[ ]." *Id.* (emphasis added). A court must then evaluate that possibility under the balancing test of *Pickering v. Board of Education of Township High School District 205. See* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Garcetti,* 547 U.S. at 418, 126 S.Ct. 1951.

At the threshold stage, as *Garcetti* illustrated, First Amendment protection attaches only to speech analogous to that which an ordinary citizen would make as part of public discourse. 547 U.S. at 423, 126 S.Ct. 1951 ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."). The First Amendment does not give more license to government employees than ordinary citizens. This is the meaning of the Supreme Court's admonition that the First Amendment neither "invest[s] [public employees] with a right to perform their jobs however they see fit," nor "empower[s] them to constitutionalize the employee grievance." *Id.* at 420, 422, 126 S.Ct. 1951 (internal quotation marks omitted).[2]

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[2] We have also recently clarified that, at the second,

As I read the precedents, Ward has failed to state a claim under the First Amendment for retaliatory discharge.

To state a First Amendment claim, the employee must show that he or she spoke not as an employee, but as a private citizen in public discourse. *See Garcetti,* 547 U.S. at 418-25, 126 S.Ct. 1951. The majority's analysis on this point addresses the requirements of "speech as a citizen" and "matter of public concern" in rather narrow terms. To be sure, they are two distinct requirements for constitutional protection. *Ceballos v. Garcetti,* 361 F.3d 1168, 1186-87 (9th Cir.2004) (O'Scannlain, J., specially concurring) (insisting on both the "speech as a citizen" and "matter of public concern" prongs of the threshold inquiry), *overruled by Garcetti,* 547 U.S. at 426, 126 S.Ct. 1951. But the idea behind the caselaw

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balancing stage, "the plaintiff bears the burden of showing the state took adverse employment action and that the speech was a substantial or motivating factor in the adverse action." *Eng v. Cooley,* 552 F.3d 1062, 1071 (9th Cir.2009) (internal quotation marks and alterations omitted). If the plaintiff carries that burden, then the government must show that, under *Pickering,* its "legitimate administrative interests outweigh the employee's First Amendment rights" or that it would have made the same decision without the employee's protected speech. *Id.* at 1071-72 (internal quotation marks omitted). In my view, for the plaintiff to state a First Amendment claim, he or she must meet at least the initial burden under *Eng.*

is to ensure that public employees are still able to participate in public debate, not to provide them job security while they pursue their own ends. *See, e.g., Pickering*, 391 U.S. at 573, 88 S.Ct. 1731 (rejecting the school's attempt to "limit [ ] teachers' opportunities to contribute to public debate"); *see also Garcetti*, 547 U.S. at 419, 126 S.Ct. 1951 ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."). We must keep our eye on the ball here, for the case before us throws something of a curve.

The typical situation requires a court to determine whether speech was primarily an internal office matter or a contribution to the public debate. *See, e.g., Connick*, 461 U.S. at 140, 103 S.Ct. 1684 (considering "whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs"). But this case involves policymaking staff in the office of the chief executive of the State of Alaska. Thus, the internal office politics are also the politics of the state. In this context, it contravenes the spirit of *Garcetti* and its predecessors to hold that, even though Ward criticized the Governor on a subject of public interest the Governor cannot constitutionally fire her for disloyalty.

The majority spends time illustrating that Ward's speech was not part of her official duties, which is surely correct. *Garcetti* does not squarely dictate the result in this case for that reason. Maj. Op. at ---- - ----; *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951 ("We hold that when public employees make

statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."). But the controlling ratio decidendi of *Garcetti* casts a longer shadow. The importance of the official nature of the speech in *Garcetti* lay in the distinction between speech that ordinary citizens make and speech that only occurs because of employment with the government. "Restricting speech that owes its existence to a public employee's professional responsibilities," the Court insisted, "does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22. *Garcetti* explicitly contrasted such speech with "the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day." *Id.* at 422, 126 S.Ct. 1951.

Thus, although Ward's press conference was not strictly part of her official duties, her importance in the Governor's administration necessarily means that more of her conduct came within the legitimate purview of her employer. The Supreme Court has emphasized the need to "afford[ ] governmental employers sufficient discretion to manage their operations." *Id.* at 422, 126 S.Ct. 1951. Nowhere is such discretion more important than at the highest levels of state government. At those levels, loyalty to the administration on matters of public concern is in a sense the price of employment. Ward chose to go public with one side of an internal struggle among the Governor's policy aides. The Governor's Office considered this to be disloyal and fired her. Especially in the context of a governor's office, this is

a classic employment decision of the kind the Supreme Court has warned should not "bec[o]me a constitutional matter." *Connick*, 461 U.S. at 143, 103 S.Ct. 1684. We must remember that "a federal court is not the appropriate forum in which to review the wisdom of [such] a personnel decision." *Id.* at 147, 103 S.Ct. 1684.

It helps to consider analogies. Take the example of an aide to a governor who criticizes publically the governor's tax policy in a press conference. Such speech would be an undoubted contribution to the public debate, but would it violate the First Amendment if the governor fired the aide for disloyalty? I think not, and I imagine the majority would agree. And if the aide criticized not tax policy but the governor's policy regarding internal complaints of sexual harassment? The result is the same, even though the subject of the criticism is a potentially illegal practice (ignoring sexual assault on female employees).[3]

Such a result would only seem harsh from the myopic perspective of the conviction that the Constitution must provide remedies for all harms. We can, and should, take allegations like those Ward

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[3] The majority conflates the supposed policy of ignoring illegality with the illegality itself, quoting back to me my observation that states sometimes adopt policies to treat women differently but not usually to harass them sexually. Maj. Op. 1070 n. 7. This only confuses the issue. My point is that the scope of an employee grievance, as opposed to a contribution as a citizen to public debate, necessarily widens the higher one climbs up the ladder of government.

made very seriously without invoking the First Amendment. "As the [Supreme] Court noted in *Connick,* public employers should, 'as a matter of good judgment,' be 'receptive to constructive criticism offered by their employees.' " *Garcetti,* 547 U.S. at 425, 126 S.Ct. 1951 (quoting *Connick,* 461 U.S. at 149, 103 S.Ct. 1684). Indeed, "[t]he dictates of sound judgment are reinforced by the powerful network of legislative enactments-such as whistle-blower protection laws and labor codes-available to those who seek to expose wrongdoing."[4] *Id.* In the appropriate circumstances, we must rely on such customary and legislative protections if we are to avoid "constitutionaliz[ing] the employee grievance." *Connick,* 461 U.S. at 154, 103 S.Ct. 1684.

II

My conclusion that the allegation of retaliatory discharge does not state an actual violation of the Constitution compels me to address, insofar as the claim is remediable under the GERA, whether that statute constitutes valid "congruent and proportional" legislation under the Supreme Court's *Boerne* test.

A

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[4] Alaska, in fact, has such a whistle-blower protection law. Alaska Stat. 39.90.100-.150.

Congress' power to enforce the Fourteenth Amendment under section 5 does not allow it "to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the [Fourteenth Amendment] cannot be said to be enforcing [it]." *Boerne,* 521 U.S. at 519, 117 S.Ct. 2157. *Boerne* requires that for "purportedly prophylactic legislation [to] constitute[ ] appropriate remedial legislation, ... 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Kimel,* 528 U.S. at 81, 120 S.Ct. 631 (quoting *Boerne,* 521 U.S. at 520, 117 S.Ct. 2157).

Because prophylactic legislation prohibits or regulates constitutional conduct that supposedly leads to unconstitutional conduct, Congress must explain its belief that regulating the former will help to prevent the latter. *See Boerne,* 521 U.S. at 519-20, 117 S.Ct. 2157. Such requirement responds to the Supreme Court's concern in *Boerne* that Congress not "decree the substance of the Fourteenth Amendment's restrictions" under the guise of enforcing them. *Id.* at 519, 117 S.Ct. 2157. The Supreme Court has outlined a three-step test for determining congruence and proportionality. "The first step ... is to identify with some precision the scope of the constitutional right at issue." *Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 365, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Next, Congress must have identified a history and "pattern of constitutional violations" by the states. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 639-640, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *see also Garrett,* 531 U.S. at

368, 121 S.Ct. 955. Finally, legislation must be in fact "congruent and proportional," in light of Congress' factual findings, "to the targeted violation." *Garrett,* 531 U.S. at 374, 121 S.Ct. 955. It seems to me that the crucial step in this case is the second one-the requirement that Congress identify a pattern of constitutional violations. One way courts pursue this inquiry is "by examining the legislative record containing the reasons for Congress' action." *Kimel,* 528 U.S. at 88, 120 S.Ct. 631.

The parties do not dispute that, when Congress enacted the GERA in 1991, it made no findings regarding discrimination against state employees at the policy-making level. When it passed the Equal Employment Opportunity Act in 1972, however, Congress did make extensive factual findings. H.R.Rep. No. 92-238, at 19 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152 (noting the existence of "widespread discrimination against minorities ... in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices"). The EEOC would like us to consider the latter findings in evaluating the former law for purposes of the *Boerne* test.

The EEOC's theory is that, with the GERA, Congress merely finished the job it started in 1972 when it amended Title VII to cover the States as employers. It cites extensive language from Supreme Court opinions and congressional records to show that gender discrimination persisted in state

government as of 1991 the way it had existed in 1972.[5] But all of the passages the EEOC quotes speak of gender discrimination in general, not at the policymaking levels of state government to which the GERA applies. The EEOC argues that it need not present such particularized congressional findings. It cites for support Justice Powell's concurrence in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). But the question is what the more recent *Boerne* requires. A concurrence published seventeen years before *Boerne* is not probative of that question.

Furthermore, even if one could consider the 1972 findings, they do not pertain to the policymaking staff covered by the GERA. In 1972, Congress did find widespread discrimination in state and local government and it acted to prevent it, *but it specifically excluded personal and policymaking staff.* That is part of the background against which Congress legislated when it enacted the GERA. If one wants to impute congressional intent to that exclusion, the only responsible imputation is that Congress did not believe a remedy was necessary

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[5] There is no attempt to show congressional concern for the violation of First Amendment rights per se. The EEOC's and Intervenor Ward's argument seems to be that preventing retaliatory discharges against state employees for complaining about sexual harassment is part of Congress' prophylactic remedy for unconstitutional gender discrimination. It therefore stands or falls with the legitimacy of prophylactic remedies for employment discrimination.

with respect to policy-making employees. That is to say, if there is any reason to believe what one reads in committee reports, the official position of the relevant House Committee belies the EEOC's position. In a section of the committee report entitled "Need for the Bill," it declared that the "time ha[d] come to bring an end to job discrimination once and for all," and that "[i]t is essential that ... effective enforcement procedures be provided the [EEOC] to strengthen its efforts to reduce discrimination in employment." H.R.Rep. No. 92-238, at 2139-41. It would follow logically from this language that whatever levels of state and local employment Congress exempted from the 1972 Act's reach did not suffer from the job discrimination that so concerned the House Committee.

The background against which Congress enacted the GERA, therefore, does not illustrate that Congress had already found a pattern of unconstitutional discrimination at the policymaking level of state and local employment. Instead it shows that Congress had excluded employees at that level from protection. Because Congress explicitly excluded policymaking employees from Title VII's reach in 1972, I do not believe this court would be justified in using the findings Congress made in doing so to support its decision in 1991 to repeal that very exclusion.

Without the 1972 findings, the EEOC can point to no evidence that Congress identified, as the Supreme Court has required it to do, a history and pattern of violations of the constitutional rights of the states against high-level personal and policy-making employees. This compels me to conclude that

the GERA is not "congruent and proportional" legislation within the meaning of *Boerne*. It therefore cannot constitute a valid abrogation of state sovereign immunity.

Neither the EEOC nor the federal courts are empowered to entertain the non-constitutional claim against the State of Alaska, which, as I have explained, is precisely Ward's retaliation claim. I must respectfully dissent from the majority's conclusion to the contrary.

IKUTA, Circuit Judge, with whom Judges TALLMAN and CALLAHAN join, dissenting:

To determine whether Congress validly abrogates a state's sovereign immunity, we must answer two questions: "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). With respect to the first question, the Supreme Court has explained that Congress's intent must be both "unequivocal and textual." *Dellmuth v. Muth,* 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989); *accord Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

The majority concludes that the Government Employee Rights Act of 1991 (GERA), Pub.L. 102-

166, title III, 105 Stat. 1071, 1088, meets this "stringent" clear-statement rule. *Dellmuth,* 491 U.S. at 228, 109 S.Ct. 2397. I disagree. In my view, a careful analysis of GERA reveals that the standard laid out in *Dellmuth* and *Atascadero,* and applied by the Court many times since, has not been met. GERA does not explicitly abrogate state sovereign immunity; it does not specify states as potential defendants; and it does not create a statutory scheme under which states are the only possible defendants. Therefore, I respectfully dissent.

I

Atascadero and *Dellmuth* considered, respectively, whether the Rehabilitation Act and the Education of the Handicapped Act abrogated state sovereign immunity. Both acts naturally and logically included states as potential defendants. But the Supreme Court concluded that, in both statutes, Congress did not sufficiently express its intent to subject the states to liability.

A

In *Atascadero,* a case from our circuit, a graduate student sued a California state hospital for discriminating against him in violation of the conditions imposed by the Rehabilitation Act. We held that Congress adequately expressed its intent to abrogate state sovereign immunity because the Rehabilitation Act authorized suits against recipients of federal assistance, and because the "Act contains

extensive provisions under which states are the express intended recipients of federal assistance." *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 360 (9th Cir.1984). Specifically, we noted that "Section 794 of the Rehabilitation Act broadly bars 'discrimination under any program or activity receiving federal financial assistance,' " and that "§ 794a(a)(2) provides remedies, procedures, and rights against 'any recipient of Federal assistance.' " *Id.* We reasoned that, "[i]f states receive federal assistance under the statute, they plainly fall within the defined class of potential defendants." *Id.* We therefore concluded that we could logically infer a congressional intent to abrogate state sovereign immunity from the Rehabilitation Act's authorization of suit against a class of defendants that necessarily included states. *Id.*

The Supreme Court reversed our decision:

> The statute thus provides remedies for violations of § 504 by "any recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

473 U.S. at 245-46, 105 S.Ct. 3142 (citations omitted).

Thus despite the fact that the Rehabilitation Act logically included states within its universe of potential defendants, and despite the states' common role as "recipient[s] of Federal assistance," the Court held "that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States." *Id.*

Similarly, in *Dellmuth,* the parent of a child with a learning disability brought an action against the child's school district and Pennsylvania's secretary of education under the Education of the Handicapped Act (later renamed the Individuals with Disabilities Education Act, *see* P.L. 101-476, 104 Stat. 1103, 1141-42 (1990)). *See* 491 U.S. at 225, 109 S.Ct. 2397. The Third Circuit held that "the text of EHA and its legislative history leave no doubt that Congress intended to abrogate the 11th amendment immunity of the states." *Id.* at 227, 109 S.Ct. 2397 (quoting *Muth v. Central Bucks Sch. Dist.,* 839 F.2d 113, 128 (3d Cir.1988)). According to the Third Circuit, "[b]ecause the EHA and its legislative history reflect the 'most basic of political knowledge that free public education is provided by and under the aegis of the states,' ... Congress clearly contemplated litigation under the Act against a state in the federal courts." *Muth v. Central Bucks Sch. Dist.,* 839 F.2d 113, 129 (3d Cir.1988) (quoting *David D. v. Dartmouth Sch. Comm.,* 775 F.2d 411, 422 (1st Cir.1985)).

Again, the Supreme Court reversed. The Court summarily rejected two "nontextual arguments" for

abrogation: first, "that abrogation is 'necessary to achieve the EHA's goals,' " and second, that Congress had amended the Rehabilitation Act after *Atascadero* to expressly abrogate state sovereign immunity. 491 U.S. at 228-29, 109 S.Ct. 2397. The Court deemed both these arguments "beside the point" and pointedly discouraged arguments based on legislative history. *Id.* at 230, 109 S.Ct. 2397 ("Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met." (quoting *Atascadero,* 473 U.S. at 242, 105 S.Ct. 3142)).

With respect to the statutory language of the Education of the Handicapped Act (the "proper focus of an inquiry into congressional abrogation of sovereign immunity"), the Court held that none of the provisions on which the Third Circuit relied met *Atascadero*'s clear-statement requirement. *Dellmuth,* 491 U.S. at 231, 109 S.Ct. 2397. The Third Circuit had focused on the Act's findings, in which Congress stated, "it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the education needs of handicapped children in order to assure equal protection of the law." *Muth,* 839 F.2d at 128 (quoting 20 U.S.C. § 1415(e)(2)) (alteration in original). The Court dismissed this reasoning: "the general statement of legislative purpose in the Act's

preamble simply has nothing to do with the States' sovereign immunity." 491 U.S. at 231, 109 S.Ct. 2397.

The Third Circuit also relied heavily on the Education of the Handicapped Act's judicial review provision, which allowed parties aggrieved by the administrative process to "bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." 839 F.2d at 129 (quoting). The Court rejected this analysis as well, reiterating its statement in *Atascadero* that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 491 U.S. at 231, 109 S.Ct. 2397 (quoting *Atascadero,* 473 U.S. at 246, 105 S.Ct. 3142).

The Court recognized that "the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA." *Id.* at 232, 109 S.Ct. 2397. Despite this recognition that the Act's "statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA," the Court held that "such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Id.* at 232, 109 S.Ct. 2397. Accordingly, the Court held that "the

statutory language of the EHA does not evince an unmistakably clear intention to abrogate the States' constitutionally secured immunity from suit." *Id.* at 232, 109 S.Ct. 2397.

This clear-statement rule has been criticized for being exceptionally demanding. *See, e.g., Will v. Mich. Dep't of State Police,* 491 U.S. 58, 75, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (Brennan, J., dissenting) ("Where the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other situation. Indeed, just today, the Court has intimated that this clear-statement principle is not simply a means of discerning congressional intent." (citing *Dellmuth,* 491 U.S. at 232, 109 S.Ct. 2397)). But it is binding precedent: under *Atascadero* and *Dellmuth,* abrogation by inference is not enough.

B

Although the *Atascadero- Dellmuth* bar is extraordinarily high, it is not insurmountable. Applying these two decisions, the Court has held that Congress can sufficiently express its intent to abrogate state sovereign immunity in one of three ways:

First, Congress may explicitly provide that it intends to abrogate state sovereign (or Eleventh Amendment) immunity. *See, e.g., United States v. Georgia,* 546 U.S. 151, 153, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (quoting the Americans With Disabilities Act, 42 U.S.C. § 12131 *et seq.,* which

"provides that 'a State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in a Federal or State court of competent jurisdiction for a violation of this chapter' " (internal alterations omitted)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 635, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (quoting the Patent Remedy Act, 35 U.S.C. § 296(a), which provides that "[a]ny State ... shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court ... for infringement of a patent" (alteration in original)).

Second, Congress may specifically define states as potential defendants. *See, e.g., Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (finding an intent to abrogate state sovereign immunity in the Family and Medical Leave Act, 29 U.S.C. § 2617, where the act expressly allowed a suit against a "public agency," defined "to include both 'the government of a State or political subdivision thereof' and 'any agency of ... a State, or a political subdivision of a State' " (quoting 29 U.S.C. §§ 203(x), 2611(4)(A)(iii)) (alterations in original)); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (finding an intent to abrogate state sovereign immunity in the Age Discrimination in Employment Act (ADEA) because it incorporated by reference a provision in the Fair Labor Standards Act (FLSA) that allowed suit against a "public agency," which in turn was defined by the FLSA to include "the government of a State").

Third, Congress may create a statutory scheme under which states are the only possible defendants. In *Seminole Tribe of Fla. v. Florida*, the Court held that the Indian Gaming Regulatory Act (IGRA) expressed a congressional intent to abrogate state sovereign immunity, although the Court also held that purported abrogation invalid. 517 U.S. 44, 57, 72, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). The Court explained that it agreed with the Eleventh Circuit's holding below (as well as with the parties "and with virtually every other court that has confronted the question") that IGRA provided an "unmistakably clear" statement of its intent to abrogate state sovereign immunity. 517 U.S. at 56, 116 S.Ct. 1114 (quoting *Dellmuth*, 491 U.S. at 228, 109 S.Ct. 2397). The Court noted that IGRA imposed duties on "a State" to negotiate in good faith with Indian Tribes, and created a complex remedial scheme imposing various liabilities on "the State" that shirked its responsibilities under IGRA. *Id.* at 56-57. The Court concluded that IGRA's provisions "refer to 'the State' in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe," *id.* at 57, 116 S.Ct. 1114, observing that IGRA's detailed remedial provisions scheme "repeatedly refers exclusively to 'the State.' " *Id.* at 75 n. 17, 116 S.Ct. 1114 (explaining why IGRA's remedial scheme implicitly precluded prospective injunctive relief under *Ex Parte Young*). Thus the Court, like the Eleventh Circuit in the decision below, concluded that the *Atascadero- Dellmuth* clear-statement rule was satisfied where Congress had created a statutory scheme that would have no effect at all if states were not potential defendants.

See Seminole Tribe v. Florida, 11 F.3d 1016, 1024 (11th Cir.1994) ("The only possible defendant to such a suit [under IGRA] is a state. Thus, unless Congress intended to abrogate the states' immunity, this portion of IGRA would be of no effect.").

In none of these cases, however, has the Court backed away from its holding in *Atascadero* and *Dellmuth* that nothing short of an unambiguous and textual statement will suffice. *See, e.g., Gregory v. Ashcroft,* 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (following *Atascadero* and holding that general statutory language prohibiting mandatory retirement did not subject states to liability).

II

GERA does not meet the stringent standard set by *Atascadero* and *Dellmuth.* GERA contains no express statement of congressional intent to abrogate state sovereign immunity, and it does not specifically define the states as defendants. Indeed, GERA contains no express definition of the individuals and entities subject to claims under its provisions. The two relevant GERA provisions in effect when Ward and Jones brought their claims in 1994 simply defined what types of discriminatory conduct were prohibited[6] and which government employees could

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[6] Section 302, 105 Stat. at 1088, codified at 2 U.S.C. § 1202 (1994), established the right of employees of the Senate to be free from specified forms of discrimination:

bring claims.[7] Nor did GERA's remedies provision,

> All personnel actions affecting employees of the Senate shall be made free from any discrimination based on-
>
> (1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C.2000e-16);
>
> (2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or
>
> (3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

[7] Section 321(a) of GERA, 105 Stat. at 1097-98, codified at 2 U.S.C. § 1220(a) (1994), defined the employees who were entitled to the protections of Section 302 of GERA to include state and local political appointees:

> The rights, protections, and remedies provided pursuant to section 302 [establishing the right of Senate employees to be free from specified discrimination] and 307(h) [establishing the remedies for violation of that right] of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof-
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policymaking level;

Section 307(h),[8] incorporate by reference any other provision of law expressly and unequivocally abrogating state sovereign immunity, as was the case in *Kimel*.

> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Section 321 was later redesignated as Section 304 by the "Congressional Accountability Act of 1995," Pub.L. 104-1 § 405, 109 Stat. 3, 41.

[8] Section 307(h) of GERA, 105 Stat. at 1092, codified at 2 U.S.C. § 1207(h) (1994), set forth the following remedies for a violation of GERA:

> If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C.2000e-5 (g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C.1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

The remedies in Section 307(h) were amended and moved to Section 302(b) in 1995. *See* Pub.L. 104-1 § 504, 109 Stat. 3, 40-41. They are currently codified at 42 U.S.C. § 2000e-16b(b).

A

The majority cites GERA's cross-reference to Title VII's back-pay remedy and concludes, based on Title VII's use of the word "employer," that this cross-reference satisfies the *Atascadero- Dellmuth* clear-statement rule. Maj. Op. at 1067 ("GERA's provisions, entitling state employees to 'back pay ... payable by the employer,' 42 U.S.C. §§ 2000e-5(g)(1), 2000e-16c, unmistakably express Congress's intent to allow suits against states for damages." (alterations in original)). Citing *Kimel,* the majority states that "GERA is cut from the same cloth as the ADEA," *id.* at 1076, suggesting that GERA incorporates Title VII's definition of states as defendants in the same way that the ADEA incorporates the FLSA's.[9]

This analogy does not survive close examination. As *Kimel* explained, the ADEA incorporates various

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[9] Title VII does not actually contain any provision that specifically provides for suit against states, but in a pre-*Atascadero* case the Supreme Court held, based on a passing reference to legislative history, that Title VII's definition of possible defendants expressed a congressional intent to abrogate state sovereign immunity. *See Fitzpatrick v. Bitzer,* 427 U.S. 445, 453 n. 9, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Although inconsistent with *Dellmuth,* 491 U.S. at 230, 109 S.Ct. 2397, this holding is nonetheless controlling with respect to Title VII. *See Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391(1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

rights of action under the FLSA: the ADEA, 29 U.S.C. § 626(b), states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in" section 216(b) of the FLSA, 29 U.S.C. § 216(b). This cross-referenced provision, section 216(b) of the FLSA, provides that an "action to recover" back pay "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). The FLSA defines "public agency" as including, among other things, "the government of a State." 29 U.S.C. § 203(x). Because the ADEA incorporated the FLSA's enforcement provision, which provides parties a right of action against states, the Court concluded that the ADEA sufficiently expressed an intent to abrogate state sovereign immunity. *See Kimel,* 528 U.S. at 73-74, 120 S.Ct. 631.

GERA, by contrast, does not incorporate the provisions of Title VII that authorize plaintiffs to maintain civil actions, 42 U.S.C. §§ 2000e-5(f), 2000e-16(c). Nor does GERA incorporate Title VII's definition of "person[s]" subject to suit, 42 U.S.C. § 2000e(a). GERA merely provides that the remedies available to GERA claimants may include "such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C.2000e-5(g) and (k))." 105 Stat. at 1091 (currently codified at 42 U.S.C. § 2000e-16b(b)). By making available such remedies "as would be appropriate," GERA indicates that Title VII's remedies are incorporated into GERA *mutatis*

mutandis, i.e., with "all necessary changes having been made." *Shalala v. Ill. Council on Long Term Care, Inc.,* 529 U.S. 1, 17, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000) (addressing a statutory scheme in which the Medicare Act provided for judicial review "to the same extent as is provided in" the Social Security Act). This is confirmed by the wording of section 706(g), the incorporated Title VII provision on which the majority relies. Section 706(g) states that in an EEOC civil enforcement action a "court may ... order such affirmative action as may be appropriate," including "reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). The natural reading of GERA's statement that claimants have "such remedies as would be appropriate if awarded under section 706(g)" is that a court may award GERA claimants back pay, reinstatement, or other equitable remedies described in § 706(g) against appropriate GERA defendants. Section 706(g) deals with the types of remedies available, not with who can be sued. Reading GERA as allowing actions against any entity mentioned in § 706(g) would lead to the incongruous conclusion that GERA authorizes suits against employment agencies and labor organizations.

Because GERA does not expressly incorporate a cause of action against the states, but merely makes Title VII's remedies available for claims otherwise authorized under its provisions, GERA's cross-reference to Title VII does not provide a basis for

concluding that it unmistakably abrogates state sovereign immunity.

B

Nor can the majority rely on the fact that some of the employees covered by GERA are employed by states. *Cf.* Maj. Op. at 1066 ("GERA expressly covers state employees, and expressly gives them a right to collect damages 'payable *by the employer* '-the state." (emphasis in original)). As the majority acknowledges, a "general authorization for suit in federal court" is an insufficient expression of congressional intent to abrogate state sovereign immunity, even if the states are logically included within the definition of persons and entities subject to suit. *Atascadero,* 473 U.S. at 245-46, 105 S.Ct. 3142 ("The statute thus provides remedies for violations of § 504 by 'any recipient of Federal assistance.' There is no claim here that the State of California is not a recipient of federal aid under the statute.").

By the same token, the fact that state employees are within the universe of potential GERA claimants is insufficient. As explained above, GERA would have to define its potential claimants in such a way as to make states the only possible defendants before we could properly find an "unmistakably clear" intent to abrogate state sovereign immunity. *Seminole Tribe,* 517 U.S. at 56, 116 S.Ct. 1114 (quoting *Dellmuth,* 491 U.S. at 228, 109 S.Ct. 2397). But unlike IGRA, the act at issue in *Seminole Tribe,* GERA does not create a remedial scheme under which states are the

only potential defendants. It does not expressly impose any duties or responsibilities on states. In fact, GERA's lone reference to "state employees" appears in the heading of Section 321, 105 Stat. at 1097, the text of which refers broadly to appointees of elected officials of "any State or *political subdivision* thereof" (emphasis added).[10] *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004) (holding that a statute's caption "cannot undo or limit that which the statute's text makes plain") (quoting *Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947) (alteration omitted)).

The plain language of GERA allows claims to be brought against a variety of non-state defendants not shielded by sovereign immunity. Most important, state officials are subject to suit under GERA. GERA allows an aggrieved employee to bring a claim for prospective injunctive relief, *see* GERA § 307(h), codified at 2 U.S.C. § 1207(h) (1994) (incorporating the injunctive relief remedies set forth in 42 U.S.C. § 2000e-5 and 29 U.S.C. § 633a), and sovereign immunity poses no bar to a GERA action against a state official so long as the complaint "alleges an ongoing violation of federal law and seeks relief

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[10] Section 302 of GERA was amended in 1995, after Ward and Jones brought their claims, to refer to the state employees referred to in Section 321 (redesignated Section 304). *See* Pub.L. 104-1, 109 Stat. at 40. Neither the majority nor the parties suggest that we should place any weight on amendments made to GERA after Ward and Jones brought their claims.

properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm. of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (O'Connor, J., concurring)); *see also Missouri v. Jenkins*, 491 U.S. 274, 290, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). Nothing in the text of GERA prevents a public employee from bringing an action against a state official in that official's individual capacity for violating GERA's non-discrimination requirement. *Cf. Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1038 (9th Cir.2006) (holding that Title VII's definition of "employer" excludes individuals); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir.1993).

Moreover, because GERA covers appointees of elected officials of a "political subdivision of any State," § 321(a), GERA claimants may also bring actions against political subdivisions of states, such as counties and municipalities, that are not shielded by sovereign immunity. *See Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006). The Tenth and Fifth Circuits have both held that GERA allows claims against counties. *See Fremont County v. EEOC*, 405 F.3d 840 (10th Cir.2005); *Brazoria County v. EEOC*, 391 F.3d 685 (5th Cir.2004). And we have construed the phrase "political subdivision of any State" in Title VII and the ADEA to include counties and cities. *See Ramirez v. San Mateo County Dist. Attorney's Office*, 639 F.2d 509 (9th Cir.1981); *see also Monce v. City of San Diego*, 895 F.2d 560 (9th Cir.1990).

C

In sum, GERA does not unequivocally and textually abrogate state sovereign immunity. It does not (1) expressly invoke Congress's intent to do so, (2) specifically define states as defendants, or (3) make states the only possible defendants. Rather, the GERA provisions at issue in this case are indistinguishable from the EHA (now IDEA) provisions in *Dellmuth,* where the act allowed suit against recipients of federal education grants who failed to provide a "free appropriate public education" to schoolchildren. *Muth,* 839 F.2d at 116. Notwithstanding the "most basic of political knowledge that free public education is provided by and under the aegis of the states," *id.* at 129, the Court held that Congress had not provided an "unequivocal and textual" expression of intent to abrogate state sovereign immunity. *Dellmuth,* 491 U.S. at 230, 109 S.Ct. 2397.

III

The parties raise an additional argument as to why GERA abrogates state sovereign immunity. As noted above, the Supreme Court held in *Fitzpatrick* that Congress sufficiently expressed its intent to abrogate state sovereign immunity in Title VII of the Civil Rights Act of 1964, as amended. *See* 427 U.S. at 453 n. 9, 96 S.Ct. 2666. While the majority bases its abrogation analysis on GERA's cross-reference to

Title VII's back-pay provision, Ward and EEOC argue, somewhat opaquely, that GERA is either part of Title VII or sufficiently similar to Title VII that we are bound by *Fitzpatrick*.

In light of *Atascadero* and *Dellmuth*, this argument is untenable. The proposition that GERA abrogates state sovereign immunity because its substantive prohibitions or policy goals are similar to those of Title VII is nothing if not an inference, and we cannot conclude Congress intended to abrogate state sovereign immunity unless it expressed that intent in the clearest terms. Nonetheless, *Fitzpatrick* remains binding precedent on the narrow issue it decided: that Title VII expresses a congressional intent to abrogate state sovereign immunity. *See Agostini*, 521 U.S. at 237, 117 S.Ct. 1997. Although neither Ward nor the EEOC went so far in their briefs as to argue that GERA is actually part of Title VII, Ward's counsel indicated that he agreed with this position at oral argument.[11]

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[11] Ward's brief notably stops short of claiming that Title III of the Civil Rights Act of 1991 (i.e., GERA) constitutes an amendment to Title VII of the Civil Rights Act of 1964, although when responding to our questioning Ward's counsel seemed willing to accept this position:

> Q: I just want to make clear what your position is on this.
>
> A: Right. I mean, Your Honor, I would not suggest that it's not part of Title VII. It's certainly an amendment to Title VII, codified as part of Title VII.... Yes, this definitely amends and adds to [Title VII]; it

A review of the history of Title VII and GERA, however, makes clear that GERA is not, and never has been, a part of Title VII. Indeed, when Ward and Jones brought their claims in 1994, the two statutes were not even in the same title of the United States Code.

Title VII of the Civil Rights Act of 1964 prohibited employment discrimination based on race, color, religion, sex, and national origin, but it did not extend its protection to state employees. *Fitzpatrick*, 427 U.S. at 449, 96 S.Ct. 2666. In 1972, after extensive hearings, Congress amended Title VII's definition of a "person" subject to suit to include "governments, governmental agencies, [and] political subdivisions," but also amended Title VII's definition of "employee" to exclude political appointees as potential plaintiffs. Pub.L. 92-261 § 2(1), (5), 86 Stat. 103, codified at 42 U.S.C. § 2000e(a), (f). The net effect of these amendments was to allow all public employees, except for elected officers and their political appointees, to sue governmental entities for employment discrimination under Title VII.

Two decades later, Congress enacted the Civil

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carries with it the same principles as Title VII. It adds a new basis of liability, and so in interpreting that new basis of liability-

Q: Why are you having trouble saying 'Yes, this is Title VII'? .... You're using double negatives and beating around the bush. Is it your position that GERA is Title VII?

A: Yes, GERA is part of Title VII, absolutely.

Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1071. Title I of the Act, entitled "Federal Civil Rights Remedies," amended various provisions of federal law, including Title VII and 42 U.S.C. §§ 1981 and 1988. Title III of the act, entitled the "Government Employee Rights Act of 1991" (GERA), created a new, self-contained act to "provide procedures to protect the right of Senate and other government employees," § 301(b), which was subsequently codified as part of Title 2 of the United States Code (statutes relating to Congress). Nothing in Title III (GERA) amended the Civil Rights Act of 1964. Congress could have easily extended Title VII to state and local political employees by amending Title VII to eliminate the exclusion of political appointees from the definition of "person" subject to protection from discrimination. *See* 42 U.S.C. § 2000e(f). Congress knew how to amend Title VII, and did so in Title I of the Civil Rights Act of 1991, *see* 105 Stat. 1074 (expressly amending Title VII). But Congress chose not to do so in GERA. Accordingly, *Fitzpatrick* does not control our abrogation analysis.

IV

Atascadero and *Dellmuth* instruct us that we cannot infer a congressional intent to abrogate state sovereign immunity simply because the states are logically included within the set of potential defendants. GERA does not expressly abrogate state sovereign immunity, either directly or by reference. Nor does GERA limit its universe of possible defendants to the states alone. Because the text of

GERA does not meet the high threshold set by the Supreme Court's clear-statement rule in *Atascadero* and *Dellmuth*, I would hold Jones's and Ward's claims against Alaska barred by sovereign immunity and grant Alaska's petition for review. Therefore, I must respectfully dissent.

United States Court of Appeals,
Ninth Circuit.
State of ALASKA, Office of the Governor, Petitioner,
v.
EEOC; United States of America, Respondents,
Margaret G. Ward, Intervenor.
No. 07-70174.

Argued and Submitted Aug. 7, 2007.
Filed Nov. 8, 2007.

Petition for Review of an Order of the United States Equal Employment Opportunity Commission.

Before: J. CLIFFORD WALLACE, JOHN T. NOONAN, and RICHARD A. PAEZ, Circuit Judges.

NOONAN, Circuit Judge:

The State of Alaska, Office of the Governor (the Governor's Office) appeals the remand order of the United States Equal Employment Opportunity Commission (the EEOC) in a suit against the State of Alaska brought by two discharged members of the Governor's Office. We hold that the suit is barred by the Eleventh Amendment and direct its dismissal.

FACTS AND PROCEEDINGS

In the election of November 1990, Governor Walter Hickel ran for reelection with Jack Coghill as his running mate for Lieutenant-Governor. Hickel and Coghill were elected. In a gesture to his ideologically-different running mate, Hickel appointed Margaret Ward (Ward) to be Director of the Office of the Governor in Anchorage and appointed Lydia Jones (Jones) to be one of his Special Staff Assistants in the same office. Both positions were exempt from civil service. Ward's responsibilities as set out by her included supervision of "all operations of Governor's Anchorage Regional Office, including personnel. Promote the goals and agenda of Governor Hickel and his administration." Jones' responsibilities, as set out in a staff description of the position, included response to the voluminous correspondence addressed to the governor and the handling of 350 to 450 telephone calls per day. The Special Assistants were expected to give "a friendly ear or helping hand for a constituent" and to be advocates of the governor's programs in the legislature or with the public. The job description concluded: "It is a position of political sensitivity demanding ever-changing priorities and the flexibility to handle almost any type of problem."

During his term of office, Lieutenant-Governor Coghill took steps to be able to run for governor in the 1994 election. By midsummer 1993, Ward was believed to be assisting his forthcoming campaign. The Governor's Office suspected that Jones was assisting her. As a consequence of these suspicions,

the Chief of Staff of the Governor's Office directed the Director of Administrative Services to issue a memorandum to all senior staff in the Governor's Office. Issued on September 23, 1993, the memo advised the senior staff of the legal limits on any campaign activities by them. On February 10, 1994, Ward received a warning against continuing her rumored campaign conduct. The next day, February 11, 1994, Ward reported to the Governor's Office that Jones was complaining about sexual harassment. On February 15, 1994, the Governor's Office ordered an investigation. On March 11, 1994, Ward and Jones held a press conference in which they criticized Governor Hickel. They were at once placed on administrative leave. On April 22, 1994, when the Governor's Office investigation was completed, their employment was terminated because of their alleged election activities.

On April 25, 1994, the Governor's Office was served with complaints to the EEOC by Jones and Ward. Jones' complaint alleged that she had suffered sexual harassment by a male Special Staff Assistant and that she had been paid less than her male counterparts because of her gender and her race (black). Ward alleged that she had suffered sex discrimination and retaliatory discrimination. Filed as charges under Title VII of the Civil Rights Act, the charges were classified by the EEOC as falling under the Government Employee Rights Act (GERA). The case lay dormant until January 15, 2003.

Before the EEOC reopened the case, Jones died. Her widower, Kenneth Miller, alleged that he stepped into her shoes. The Governor's Office, pleading immunity under the Eleventh Amendment

and assorted other defenses, moved for summary judgment. On January 4, 2005, an Administrative Law Judge denied summary judgment on the other defenses, but doubted if he had jurisdiction to rule on immunity under the Eleventh Amendment and so made no ruling on this defense, certifying it to the EEOC itself. On December 14, 2006, the EEOC ruled that "an agency will not rule on the constitutionality of a statute that it is assigned to administer." The EEOC remanded the case to the ALJ.

The Governor's Office appeals.

ANALYSIS

Ordinarily we do not have jurisdiction to review an order that is not final. Such is the EEOC's order of remand. But there are exceptions, and this case is one. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (holding that an order denying a State's claim to Eleventh Amendment immunity is an appealable collateral order). We proceed to examine the merits of the immunity asserted by the Governor's Office.

Amendment XI to the Constitution of the United States, adopted in 1798, reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Almost a century later the Supreme Court of the United States expanded the extent of the

immunity conferred on the States by adding citizens of the same State to the category of potential plaintiffs disabled from pursuing a remedy for a wrong alleged to have been committed by the State. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

The Eleventh Amendment textually poses no barrier to a suit by the United States or an agency of the United States against a State. But in 2002, it was held that the immunity of a State "extends beyond the literal text of the Eleventh Amendment." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 754, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). The Supreme Court remarked that "we cannot imagine" that the Framers would have found it acceptable to compel a State to answer the complaints of private parties that were channeled through a federal agency. *Id.* at 760, 122 S.Ct. 1864. The dignity of a State would be compromised. *Id.* The EEOC is in no better position than the Federal Maritime Commission when it presents the complaint of two private persons.

Amendment XIV, however, imposes obligations on the States. Section 5 of the amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The Fourteenth thus trumps the Eleventh if Congress legislates to enforce the Fourteenth and the legislation is appropriate. The Supreme Court has set criteria for legislation to meet if the Supreme Court is to judge the legislation appropriate. The Court requires that Congress has "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority."

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

In 1972, Congress held extensive hearings on discrimination in the treatment of the ten million or more employees of state and local governments. On the basis of these hearings, the relevant committees found extensive gender and racial discrimination by the States. See H.R.Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, and S.Rep. No. 92-415 (1971). The reported instances of discrimination appeared to be across the board. No special mention, one way or the other, was made of highly-placed employees serving in posts close to the governor of a State. As enacted in 1972, the Equal Employment Opportunity Act based on the hearings excluded from its protection elected officers and "any person chosen by such officer to be on such officer's personal staff" and employees "on the policymaking level" or serving the official as "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e(f) (1972). The legislative history shows an acute awareness in the Senate of the undesirability of sweeping such key persons under the general prohibitions of discrimination. *See Gregory v. Ashcroft,* 501 U.S. 452, 491-92, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (Blackmun, J., dissenting).

In 1991, the Equal Employment Opportunity Act of 1972 was amended by GERA, 42 U.S.C. §§ 2000e-16a *et seq.* GERA wiped out the existing exemption of members of an elected official's personal staff, those serving the official on a policymaking level, and those serving as immediate advisers. GERA was enacted with no findings by Congress as to state practices of

discrimination against employees at this level of government. Without such findings was GERA a proportionate response to an identified evil? If not, GERA failed to meet the criteria set by the Supreme Court. *See City of Boerne v. Flores,* 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

The EEOC argues that the necessary findings had already been made in the hearings that preceded enactment of the Equal Employment Opportunity Act of 1972. The existence of widespread racial and sexual discrimination in state governments had been shown; the policymakers were not distinguished as different. If the findings were strong enough to sustain the Equal Employment Opportunity Act of 1972, they are, says the EEOC, strong enough to sustain GERA.

Does this piggyback work? The Governor's Office denies that it does. One substantial difficulty is that separate provisions of the same act may have different effects on Eleventh Amendment immunity. *Compare Tennessee v. Lane,* 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (holding that Title II of the Americans with Disabilities Act (ADA) validly abrogated state immunity as to cases involving the right of access to the courts) *with Bd. of Trs. of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (holding that Title I of the ADA did not validly abrogate state immunity as to the disabled alleging employment discrimination on account of their disability); *see also Garrett,* 531 U.S. at 360 n. 1, 121 S.Ct. 955 ("We are not disposed to decide the constitutional issue whether Title II [of the ADA], which has somewhat different remedial provisions from Title I [of the ADA], is appropriate

legislation under § 5 of the Fourteenth Amendment ..."). What matters is the effect on Eleventh Amendment immunity that a particular provision has, not whether it amends or is part of another piece of legislation.

The Supreme Court has held that the Family and Medical Leave Act (FMLA) validly abrogated Eleventh Amendment immunity in part because, "of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers." *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 739, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). *Hibbs* suggests that GERA's expansion of the class of covered employees changes the Eleventh Amendment analysis.

In the course of holding that the Age Discrimination in Employment Act did not disturb the immunity of Missouri's age limitation on judicial office, the Supreme Court observed:

> "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham,* 178 U.S. 548, 570-571, 20 S.Ct. 890, 44 L.Ed. 1187 (1900). See also *Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, 161, 12 S.Ct. 375, 36 L.Ed. 103 (1892) ("Each State has the power to prescribe the qualifications of its

officers and the manner in which they shall be chosen").

Gregory, 501 U.S. at 460, 111 S.Ct. 2395.

In 1972, Congress thought of state policymakers as different from other state employees, and so Congress specifically excluded them from coverage. The exclusion is at least an indication that the hearings did not establish an existing evil in the selection and retention of a governor's close associates. Nothing in the record shows that a pattern of gender discrimination as to a governor's staff, advisers, and policymakers existed in 1991 when GERA was enacted. The absence of such evidence is critical. Very few modern governors, it may fairly be assumed unless the contrary were shown, would intentionally discriminate on the basis of gender or race in choosing key advisers, and very few modern governors who did discriminate would be likely to keep their office. It would be guesswork, unsupported by the record, to suppose that a widespread pattern of intentional discrimination on account of gender or race existed among the fifty governors of the states as they selected staff assisting them in the exercise of their office.

No modern governor could run his government without the assistance of the sort provided in Alaska by the Director of the Governor's Office in Anchorage and by the Special Staff Assistants. Being a governor is not a one-person job. The governor acts by his policymaking assistants. To treat these assistants as subject to federal legislation is tantamount to holding

that the highest elected official in a state is bound by GERA. We do not believe that GERA is a proportionate response to a widespread evil identified as the predicate of this legislation. Accordingly, we grant the Governor's Office's appeal and remand to the EEOC with directions to dismiss the suit.

Remanded to the EEOC with directions to dismiss the suit.

WALLACE, Circuit Judge, concurring:

The dissent reads like a law review outline of relevant law but it makes an assumption I cannot accept. I therefore concur in Judge Noonan's opinion.

In 1972, Congress made findings showing widespread discrimination among state employees. The proposed legislation, however, was amended to exclude certain high level employees. What can we know based on this fact?

What we *know* is that there was a record of discrimination in state employment generally but that Congress voted not to extend the statute's coverage to certain high level state employees.

What the dissent *assumes* is that this was done for purely political reasons based on only a few representatives' concerns about state rights. It is true that two senators asserted this argument in support of the amendment. But that does not tell us the intent of hundreds of other lawmakers at the time of their votes.

This is the problem with basing assumptions on legislative history. As Justice Scalia has persuasively written:

> "[T]he use of legislative history .... is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question. That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained *any* view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority was blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved."

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 31-32 (Amy Gutmann ed., Princeton University Press 1997) (emphasis in original). The upshot is that we have an amended statute that excluded a certain segment of state employees from its coverage. There is no reliable history other than the face of the statute. Assumptions and speculation aside, there is no acceptable way of knowing the reason each member of Congress voted. We know only that Congress chose to exclude a specific group despite general findings.

One may well and should applaud the

Fourteenth Amendment as a way to attack state discrimination. But it must do so within constitutional limits. While the Fourteenth Amendment was an important constitutional amendment, it does not override the basic constitutional doctrine. The founders were cynical about governmental powers. The Constitution was not a rights-granting document (other than the right to patent) but was to limit government-that is, to protect the people from government. The Fourteenth Amendment does much, but it does not trump these fundamental safeguards.

Thus, Congress is not free to set aside "Our Federalism" beyond what adopted amendments permit. Here, Congress failed to do what the Constitution requires. Parties supporting GERA must show that there was a proper record justifying congressional action. Arguing by pointing to isolated statements in the legislative history that the 1972 exclusion was based on political concerns-and thereby implying that, those political concerns aside, Congress could have included high level state employees-will not do. In 1990, Congress could have made a record justifying the new expansion of the 1972 Act. This it failed to do. There are limitations even on Congress.

We do not know why Congress excluded high level state employees in 1972, and the 1990 Congress cannot simply shortcut its action by reference to the 1972 Act. It needed to take the time for hearings to develop an appropriate record. It is not that Congress cannot pass a statute such as GERA; it is that it must do so in a prescribed manner. Its failure to do so here requires the conclusion that the

constitutional protections on state sovereign immunity have not been met. For this reason, I join the result advanced by Judge Noonan.

PAEZ, Circuit Judge, dissenting:

I would hold that Congress validly abrogated the States' Eleventh Amendment immunity to private claims for damages under the Government Employee Rights Act ("GERA"), 42 U.S.C. § 2000e-16a to 16c. I therefore respectfully dissent. Because the majority decides the Eleventh Amendment inquiry on narrow grounds, and because I disagree with its holding, I proceed to address the two predicate inquiries of the immunity analysis: congressional intent and constitutional authority. I turn first to congressional intent.[12]

I. Congressional Intent

To abrogate the States' Eleventh Amendment immunity, Congress must "unequivocally express[ ] its intent to abrogate that immunity." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). In my view, Congress unequivocally expressed such an intent in GERA.

As the Supreme Court explained in 1976 in

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[12] Because the underlying factual dispute is not at issue in this appeal, I do not quarrel with the majority's factual summary. I note, however, that the EEOC has yet to address the merits of Ward's and Jones' claims.

Fitzpatrick v. Bitzer, Title VII of the Civil Rights Act of 1964 expressly excluded the States from its purview. 427 U.S. 445, 448-49 & n. 2, 96 S.Ct. 2666, 49 L.Ed.2d 614. The 1972 amendments to Title VII,[13] however, "made clear that [Title VII] was being extended to persons aggrieved by public employers." *Id.* at 449, n. 2, 96 S.Ct. 2666. With regard to the States, the 1972 amendments extended Title VII's protections to "employees subject to the civil service laws of a State government, governmental agency or political subdivision." 42 U.S.C. § 2000e(f). Conversely, the amendments excluded:

> any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

Id. The 1972 amendments also changed the definition of "respondent" to include government employers,[14] and thereby expressly subjected the

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[13] Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.*

[14] *See* 42 U.S.C. § 2000e(a) (defining "person" to include "governments, governmental agencies, [and] political subdivisions"); *id.* § 2000e(b) (defining "employer" to include, subject to certain conditions and exceptions, "a person engaged

States to private suits for damages by their employees. *See Fitzpatrick,* 427 U.S. at 448-49 & n. 2, 96 S.Ct. 2666; *Okruhlik v. Univ. of Ark.,* 255 F.3d 615, 623 (8th Cir.2001).

Fitzpatrick therefore concluded that "congressional authorization to sue the State as employer" and "abrogate the immunity conferred by the Eleventh Amendment" was "clearly present" in the 1972 amendments. 427 U.S. at 451-52, 96 S.Ct. 2666 (citation and internal quotation marks omitted); *see also Cerrato v. S.F. Cmty. Coll. Dist.,* 26 F.3d 968, 976 (9th Cir.1994) ("The Supreme Court has held that Congress has abrogated the Eleventh Amendment with respect to Title VII claims."). The Court also held that Congress validly exercised its authority under § 5 of the Fourteenth Amendment in abrogating the States' Eleventh Amendment immunity, because Title VII as amended was "'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment." *Fitzpatrick,* 427 U.S. at 456, 96 S.Ct. 2666.

Fifteen years after *Fitzpatrick,* Congress enacted GERA as part of the Civil Rights Act of 1991 ("1991 Act"), extending Title VII's protections to the state employees excluded from the 1972 amendments. The preamble to the 1991 Act states that it is "[a]n Act to *amend* " Title VII. Pub.L. No. 102-166, 105 Stat. 1071, 1071 (1991) (emphasis added); *see also*

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in an industry affecting commerce"); *id.* § 2000e(n) (defining "respondent" to include, *inter alia,* "an employer").

Okruhlik, 255 F.3d at 623 ("Although the 1991 Act is a separate statutory provision, the preamble makes clear that it was intended to amend Title VII."). Likewise, the text of GERA clarifies that it was intended to amend and extend Title VII. As originally enacted as Section 321 of the 1991 Act, GERA was titled "Coverage of *previously exempt* State employees." 105 Stat. at 1097 (emphasis added); *see also* 42 U.S.C. § 2000e-16c (GERA statutory provisions, as currently codified, with same title). GERA's definition of the covered state employees is also virtually identical to the text of the 1972 amendments that excluded these employees:

> [T]his title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof-
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policymaking level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C. § 2000e-16c(a). As the Tenth Circuit

explained in *Board of County Commissioners, Fremont County, Colorado v. EEOC* (" *Fremont County*"): "In 1991, Congress enacted GERA, and extended protections against discrimination to previously exempt state employees. In so doing, Congress echoed the exclusionary language of Title VII, specifically extending protections against discrimination ... to previously exempt high-level state employees." 405 F.3d 840, 844 (10th Cir.2005); *see also Brazoria County, Tex. v. EEOC,* 391 F.3d 685, 689-90 (5th Cir.2004) (explaining that the GERA provision that prohibits discrimination on the basis of race or sex, 42 U.S.C. § 2000e-16b(a)(1), uses language identical to and expressly incorporates the meaning of the Title VII section that protects most federal employees, *id.* § 2000e-16).

For these reasons, at least one of our sister circuits has determined that GERA should be understood as amending and extending Title VII. *See Fremont County,* 405 F.3d at 849 ("GERA was the last step in the sequence of broadening Title VII to provide protections to state employees.... In passing the 1972 Title VII amendments and continuing through GERA as part of the Civil Rights Act of 1991, Congress provided an expanding class of state employees with what Congress found were necessary protections from discrimination.").

In light of these considerations, there can be no serious doubt that Congress expressed its unequivocal intent in GERA to abrogate the States' Eleventh Amendment immunity. Because the 1991 Act and GERA effectively amended Title VII and extended its protections to certain previously excluded state employees, Congress, in my view,

must have intended GERA to incorporate the 1972 amendments' express inclusion of state employers as possible respondents to private Title VII claims for damages and the Supreme Court's 1976 holding that the 1972 amendments therefore validly abrogated the States' Eleventh Amendment immunity. *Cf. Fremont County,* 405 F.3d at 845 ("We assume that Congress knows the law and legislates in light of federal court precedent.").

The Eighth Circuit's decision in *Okruhlik* strongly supports this conclusion. In *Okruhlik,* the court rejected the defendant state university's argument that "claims of disparate treatment and disparate impact discrimination under Title VII ... are barred by the Eleventh Amendment ... because [Congress] did not make an unmistakably clear expression of its intent to [abrogate the States' Eleventh Amendment immunity] in the 1972 Act or in the 1991 Act." 255 F.3d at 621-22. As the Eighth Circuit explained: "Subsequent to *Fitzpatrick,* this court has consistently held that the 1972 and 1991 Acts abrogated the Eleventh Amendment. Other circuits have reached the same conclusion based on *Fitzpatrick." Id.* at 622 (citations omitted) (citing, *inter alia,* this court's holding in *Cerrato*).

Although the Eighth Circuit did not specifically address the GERA provisions of the 1991 Act, it held that Congress manifested an unequivocal intent to abrogate the States' Eleventh Amendment immunity as to other provisions of the Act. In rejecting the Eleventh Amendment challenge, the court did so, not because these other provisions standing alone expressly provided that the States were subject to private claims for damages, but because Congress

intended these provisions to amend and therefore be read in conjunction with Title VII and the 1972 amendments. *See Okruhlik,* 255 F.3d at 623 ("Although the 1991 amendments do not define 'respondent,' the definition of respondent in Title VII includes state employers."). Likewise here, reading GERA and Title VII *in pari materia,* Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity: GERA extends Title VII to allow previously exempt state employees to pursue private claims for damages against their employers, and Title VII expressly provides that state employers can be defendants to such claims and therefore abrogates the States' sovereign immunity.

Even examining GERA independent of Title VII, the text of the statute standing alone unequivocally establishes that Congress intended for the States to be defendants to private claims for damages. GERA provides for compensatory but not punitive damages as a remedy for covered "State employees" intentionally discriminated against by any "personnel actions affecting [them]." 42 U.S.C. § 2000e-16b(a)-(b). In theory, there are two possible defendants to such claims: (1) the States; and (2) the individual state agents who engaged in the discriminatory behavior. At the time Congress enacted GERA, however, all but one of the Circuits to address the issue had held that under Title VII's definition of "employer," individual defendants could

not be held liable for damages.[15] *Compare Busby v. City of Orlando,* 931 F.2d 764, 772 (11th Cir.1991) ("Individual capacity suits under Title VII are ... inappropriate."), *Padway v. Palches,* 665 F.2d 965, 968 (9th Cir.1982) ("The individual defendants cannot be held liable for back pay."), *Clanton v. Orleans Parish Sch. Bd.,* 649 F.2d 1084, 1099 (5th Cir.1981) (same), *and Monell v. Dep't of Soc. Servs.,* 532 F.2d 259, 261 (2d Cir.1976), *rev'd on other grounds,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (same), *with Paroline v. Unisys Corp.,* 879 F.2d 100, 104 (4th Cir.1989), *vacated in part on other grounds,* 900 F.2d 27 (4th Cir.1990) (en banc) (holding the opposite).

Although GERA does not define "employer," Congress must have intended, given this significant circuit court precedent and the similarities between GERA and Title VII, for there to be no individual liability under GERA either. Consequently, the only possible defendants to private claims for damages under GERA are the States. GERA's damages remedy would therefore be a nullity if Congress had not intended to abrogate the States' Eleventh Amendment immunity, because covered state employees could not file claims for damages against anyone. This limitation on potential defendants distinguishes the present case from *Dellmuth v. Muth,* 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181

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[15] The decisions prior to 1991 address only back pay because compensatory damages were unavailable prior to the 1991 Act. See Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 n. 2 (9th Cir.1993).

(1989), where the Supreme Court held that Congress did not express its unequivocal intent in the Education of the Handicapped Act to abrogate the States' Eleventh Amendment immunity. There, the Court held that in light of the statutory text, it was only a "*permissible* inference" that States would be defendants to private claims for damages. *Id.* at 232, 109 S.Ct. 2397 (emphasis added). Here, to the contrary, it is a *necessary* inference that States would be defendants to private claims for damages, because States are the only possible defendants to such claims. It would be absurd to imagine that when Congress expressly provided for these claims, it did not intend for there to be a responsible party against whom relief could be awarded.

For all of the above reasons, I would hold that when Congress enacted GERA as part of the 1991 Act, it unequivocally intended to abrogate the States' Eleventh Amendment immunity.

II. Valid Exercise of § 5 Power

To abrogate the States' Eleventh Amendment immunity, Congress must also "act[ ] pursuant to a valid grant of constitutional authority." *See Tennessee v. Lane,* 541 U.S. 509, 517, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (internal quotation marks omitted). As the Supreme Court has explained, Congress "can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Id.* at 518, 124 S.Ct. 1978. Further,

Congress "must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions" that violate the Fourteenth Amendment. *Id.* at 520, 124 S.Ct. 1978; *see also Kimel,* 528 U.S. at 80-81, 120 S.Ct. 631 ("It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." (alteration and internal quotation marks omitted)).

Congress cannot, however, substantively redefine Fourteenth Amendment rights in exercising its § 5 authority. *See Kimel,* 529 U.S. at 81, 120 S.Ct. 1119; *see also Lane,* 541 U.S. at 520, 124 S.Ct. 1978 ("Congress must have wide latitude in determining where [the line between remedial legislation and substantive redefinition of Fourteenth Amendment rights] lies. But ... the distinction exists and must be observed." (citation and internal quotation marks omitted)). The Court has set forth a test to observe this distinction: "Section 5 legislation is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Lane,* 541 U.S. at 520, 124 S.Ct. 1978 (quoting *City of Boerne v. Flores,* 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). In turn, the Court applies a three-step analysis to determine whether legislation is "congruent and proportional."

The first step of the analysis is "to identify the constitutional right or rights that Congress sought to enforce when it enacted" the legislation. *Id.* at 522, 117 S.Ct. 2157; *see also Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 365, 121 S.Ct. 955, 148

L.Ed.2d 866 (2001) ("The first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue."). Here, in enacting the relevant GERA provisions, Congress sought to exercise its § 5 power to protect the rights of certain state employees under the Equal Protection Clause of the Fourteenth Amendment to be free from discrimination on the basis of race or sex.[16]

The second step in the analysis is to determine whether the legislation validly enforces these constitutional rights, "a question that must be judged with reference to the historical experience which [the legislation] reflects." *Lane*, 541 U.S. at 523, 124 S.Ct. 1978 (internal quotation marks omitted). As the Court explained in *Garrett*, "[o]nce we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional ... discrimination." 531 U.S. at 368, 121 S.Ct. 955. In enacting GERA to provide a remedy to state employees who experience race and gender discrimination, Congress did not need extensive evidence of such discrimination, because race and gender-based classifications are subject to strict and heightened scrutiny respectively. *See Lane*, 541 U.S.

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[16] Although GERA also protects against discrimination on the basis of religion, age, and disability, we do not address these provisions here, as we must identify with "some precision," Garrett, 531 U.S. at 365, 121 S.Ct. 955 (emphasis added), the constitutional rights at issue.

at 528-29, 124 S.Ct. 1978 ("We explained that because the [Family Medical Leave Act ('FMLA')] was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, 'it was easier for Congress to show a pattern of state constitutional violations' than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review." (quoting *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-37, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003))). Indeed, in holding that there was not sufficient evidence of age-based discrimination for Congress to validly abrogate the States' sovereign immunity under the Age Discrimination in Employment Act ("ADEA"), *Kimel* emphasized that the right at issue did not involve race or gender-based classifications:

> Age classifications, *unlike governmental conduct based on race or gender*, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. Older persons, again, *unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a history of purposeful unequal treatment.*

528 U.S. at 83, 120 S.Ct. 631 (emphases added) (citation and internal quotations marks omitted).

In light of this standard, I would hold that the evidence before Congress was more than sufficient

for Congress to exercise its § 5 authority to enact GERA and abrogate the States' Eleventh Amendment immunity. As discussed above, the 1991 Act and GERA extended Title VII's protections to certain previously excluded state employees. In enacting GERA, Congress was therefore entitled to rely on the extensive evidence from when it enacted the 1972 amendments of widespread employment discrimination by the States on the basis of race and sex. *See Fremont County,* 405 F.3d at 848 ("[B]ecause GERA's language concerning previously exempt state employees is identical to that in Title VII's exclusion, we may accord substantial weight to the legislative history of the cognate Title VII provision in construing [GERA].").

Specifically, in assessing the evidence before it in 1972, Congress found that "widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices." H.R.Rep. No. 92-238, at 19 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152. Congress also found that "employment discrimination in State and local governments is more pervasive than in the private sector," and explained that:

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of

> discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens.

Id. at 2152, 2154.

As the Tenth Circuit therefore concluded in *Fremont County,* rejecting a Tenth Amendment challenge to GERA: "In passing the 1972 Title VII amendments and continuing through GERA as part of the Civil Rights Act of 1991, Congress provided an expanding class of state employees with what Congress found were *necessary protections* from discrimination." 405 F.3d at 849 (emphasis added).

Supreme Court decisions further recognize that race and gender-based employment discrimination by the States persisted at the time Congress enacted GERA. As the Court explained in *Hibbs* in 2003: "It can hardly be doubted that ... women still face pervasive ... discrimination ... in the job market. According to evidence that was before Congress when it enacted the FMLA [in 1993], States continue to rely on invalid gender stereotypes in the employment context ...." 538 U.S. at 730, 123 S.Ct. 1972 (alteration, citation, and internal quotation marks omitted). The Court has said the same of work-place discrimination on the basis of race. *See Kimel,* 528 U.S. at 83, 120 S.Ct. 631 ("[T]hose who suffer discrimination on the basis of race ... have ... been subjected to a history of purposeful unequal treatment." (internal quotation marks omitted)).

The majority concludes, however, that this evidence of race and gender-based discrimination by the States was insufficient for Congress to validly

exercise its § 5 power in enacting GERA. None of the majority's reasons are convincing. As an initial matter, insofar as the majority suggests that GERA's extension of Title VII's protections to elected state officials and their staffs is bad policy, such policy considerations are of course irrelevant to our legal inquiry. It was for Congress alone to decide whether these employees should be protected under Title VII.

The majority also infers from Congress' decision to exclude from the 1972 amendments the state employees now covered by GERA, that the 1972 "hearings did not establish an existing evil" of state discrimination against these employees. This inference, however, is contrary to the congressional record, which suggests that Congress exempted these state employees because certain Senators were concerned about intruding on state rights, not because there was an absence of evidence of discrimination against these employees. As the Tenth Circuit explained in *Fremont County:*

> In the floor debates on the extension of Title VII protections to state employees, Senator Ervin introduced an amendment to exempt those state employees who were chosen by elected officials or who were close personal advisors to elected officials. In the ensuing debates Senator Allen decried federal government encroachment on the powers of local government that would result. To accommodate these Tenth Amendment concerns, when Congress extended Title VII protections to state employees in 1972 it

> exempted high-level state employees in recognition of the federalism concerns encompassed in their inclusion. It similarly rejected coverage for congressional employees at that time.

405 F.3d at 848-49 (citations and footnotes omitted) (citing 118 Cong. Rec. 1677, 4096-97, 4483, 4494 (1972)).[17]

Indeed, as the majority recognizes, when Congress found extensive evidence of race and gender-based discrimination by the States in 1972, "the reported instances of discrimination appeared to be across the board." In holding that this widespread evidence of workplace discrimination by the States is not sufficient evidence of discrimination against the particular state employees covered by GERA, the majority parses it more finely than the Supreme Court and our sister circuits have found appropriate. Notably, although the Supreme Court has generally required evidence of constitutional violations by the States, not just private parties, it has otherwise found evidence of a wide variety of constitutional violations relevant to the Eleventh Amendment inquiry. *See Lane*, 541 U.S. at 527 n. 16, 124 S.Ct.

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[17] *See also* 118 Cong. Rec. 4494 (statement of Sen. Allen) ("If it is so good for the States, why should it not be equally good for [congressional] employees.... I do not feel that the law should be applicable to the States, ... this is just another instance of the further encroachment by the Federal Government on the powers of local government.").

1978 ("[O]ur cases have recognized that evidence of constitutional violations on the part of *nonstate* governmental actors is relevant to the § 5 inquiry." (emphasis added)); *id.* (noting that "the evidence before the Congress that enacted the FMLA," which *Hibbs* determined was sufficient to abrogate Eleventh Amendment immunity, "related primarily to the practices of private-sector employers and the Federal Government" and "in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States").

As the Eighth Circuit has explained, the Supreme Court "has generally disallowed remedial legislation founded in Congress's power under Section 5 of the Fourteenth Amendment in instances where Congress failed to establish and identify the *general* problem that the legislation was intended to ameliorate." *Maitland v. Univ. of Minn.*, 260 F.3d 959, 965 n. 5 (8th Cir.2001) (discussing *City of Boerne,* 521 U.S. at 530-32, 117 S.Ct. 2157, and *Kimel,* 528 U.S. at 83-86, 120 S.Ct. 631). Conversely, at least where, as here, the remedial legislation protects against discrimination on the basis of classifications subject to heightened or strict scrutiny, and the evidence before Congress established a history of discrimination by the States on the basis of these classifications, the Court has not invalidated such legislation on the ground that the evidence was not exactly or explicitly tailored to the harms that Congress sought to remedy.

Thus, our sister circuits have consistently rejected Eleventh Amendment challenges to specific Title VII protections even where the 1972 findings did not explicitly address the exact type of

discrimination at issue. The Eighth and Tenth Circuits, for instance, have upheld Title VII retaliation claims against Eleventh Amendment challenges even though "Congress did not specifically note in the legislative record a widespread pattern of retaliatory discharge by the states." *Warren v. Prejean*, 301 F.3d 893, 899 (8th Cir.2002); *see also Crumpacker v. Kans. Dep't of Human Res.*, 338 F.3d 1163, 1170 (10th Cir.2003). As the Tenth Circuit explained:

> The State argues that, while Congress may have identified a pattern of unconstitutional gender discrimination by the states, it failed to identify a pattern of retaliatory conduct by the states. This court, however, need not parse the legislative findings with regard to Title VII as finely as the State suggests.... To properly enact legislation under its § 5 authority, Congress need not identify a pattern of each *form* of gender discrimination in the workplace by the states. Rather, Congress need only identify a history and pattern of unconstitutional behavior on the part of states. Here, Congress clearly identified a pattern of unconstitutional employment discrimination on the basis of gender by the states.

Crumpacker, 338 F.3d at 1170 (alteration, citations, and internal quotation marks omitted).

Similarly, in *Maitland*, the Eighth Circuit rejected the defendants' contention "that Congress failed to identify a history and pattern of

unconstitutional employment discrimination by the States *against men* when it enacted and amended Title VII." 260 F.3d at 964 (emphasis added). As the court concluded, the Constitution does not require "a parsing of the legislative findings or review of the 'proportionality and congruity' of remedies to determine whether the Eleventh Amendment bar also has been removed with respect to Title VII actions by men." *Id.* at 965. Applying the reasoning of these decisions here, the evidence before Congress of widespread race and gender-based employment discrimination by the States was sufficient to support its enactment of GERA, because Congress did not need to make explicit findings with regard to the particular subset of state employees covered by GERA.

In sum, given the deference we owe to Congress when it exercises its § 5 authority, it was entitled in enacting GERA to rely on the extensive evidence from 1972 of widespread race and gender-based discrimination by the States against their employees. Further, because Congress' 1972 decision to exempt the state employees now covered by GERA appears to have been based not on a lack of evidence of discrimination but on political considerations, and because neither the Supreme Court nor our sister circuits have parsed more finely evidence of state constitutional violations, we must infer that the across the board findings of employment discrimination by the States encompassed these state

employees.[18]

Finally, the majority contends that even if the evidence of discrimination was sufficient as of 1972, "[n]othing in the record shows that a pattern of gender discrimination as to a governor's staff, advisers, and policymakers existed in 1991 when GERA was enacted." As discussed above, see *supra* at 487-90, however, Supreme Court decisions recognize that the discrimination Congress found in 1972 persisted at the time Congress enacted GERA. *See also* H.R.Rep. No. 102-40(II), at 5 n. 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 698 (Congress declaring that, "[i]n support of the 1972 amendments to extend Title VII state and local governments," it had "reaffirmed that employment discrimination was pervasive, complex and rooted in 'employment systems' and 'various institutional devices.' "); 1991 Act, Pub.L. No. 102-166, 105 Stat. at 1071 (Congress stating that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace").

The third and final step in the "congruent and

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[18] The majority argues that GERA cannot "piggyback" on Congress' findings from the 1972 amendments. The historical record does not support this colorful characterization of the EEOC's position. The EEOC contends that we should infer that Congress' finding of widespread employment discrimination by the States in 1972 encompassed the subset of state employees covered by GERA. I agree with the EEOC that when Congress changed its position in 1991 and decided as a policy matter to cover these previously excluded state employees, it was, in light of the prior record, entitled to do so.

proportional" analysis is to determine whether the § 5 legislation "is an appropriate response to [the] history and pattern of unequal treatment," *Lane,* 541 U.S. at 530, 124 S.Ct. 1978-*i.e.* whether the "rights and remedies created by the [legislation] against the States" are congruent and proportional to the constitutional violations. *Garrett,* 531 U.S. at 372, 121 S.Ct. 955.

I would hold that GERA is an appropriate response to the evidence of employment discrimination by the States. Most importantly, GERA provides for money damages only against state employers who "engaged in unlawful intentional discrimination"-conduct that also directly violates the Equal Protection Clause. *See Okruhlik,* 255 F.3d at 626 ("[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution."). Thus, contrary to the legislation at issue in cases such as *Garrett* and *Hibbs,* GERA does not require the States to provide any substantive entitlements to their employees beyond what the Constitution requires.[19] *Cf. Garrett,* 531 U.S. at 361, 121 S.Ct. 955 ("[T]he Act requires employers to make reasonable

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[19] For this reason, although *Hibbs* found that the FMLA was appropriate legislation in part because it exempted those state employees who are covered under GERA, the majority's reliance on *Hibbs* is misplaced. GERA is appropriate legislation even though it covers these employees, because, unlike the FMLA, it subjects state employers to financial burdens only when the harm suffered by the employee rises to the level of a constitutional violation.

accommodations to [disabled individuals]...." (alteration and internal quotation marks omitted)).

GERA also imposes other reasonable limits on damages. By incorporating 42 U.S.C. § 1981a(a), GERA provides the same damage remedies to the covered state employees that § 2000e-16 provides to federal employees, instead of the more expansive remedies available to private sector employees.[20]

Specifically, GERA precludes punitive damages and caps compensatory damages at between $50,000 and $300,000, depending on the size of the state employer. *See* 42 U.S.C. § 1981a(b)(1), (b)(3). Also, prior to acting on a complaint by a state employee, the EEOC must refer the complaint to any state or local fair employment practices agency authorized to grant or seek relief from the alleged discrimination. *Id.* § 2000e-16c(b)(2) (incorporating § 2000e-5(d)). Upon request by the state or local agency, the EEOC must then provide the agency "a reasonable time, but not less than sixty days ... to act under such State or local law to remedy the practice alleged." [21] *Id.* §

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[20] Congress also provides similar remedies to federal employees who are similarly situated to the state employees protected by GERA. Specifically, presidential and congressional employees, who were originally covered directly under GERA, are now covered by the Presidential and Executive Office Accountability Act, 3 U.S.C. § 401 *et seq.*, and the Congressional Accountability Act of 1995, 2 U.S.C. § 1301 *et seq.*

[21] The EEOC followed these requirements in the instant case by transmitting copies of Ward's and Jones' complaints to the Alaska State Commission for Human Rights, which "acknowledge[d] receipt of the referenced charge[s]" but "indicate[d] [its] intention not to initially investigate the[m]."

2000e-5(d).

Accordingly, GERA is congruent and proportional to the evidence of the States' violations of its employees' Fourteenth Amendment rights to be free from discrimination on the basis of race or sex. *See Lane,* 541 U.S. at 431, 124 S.Ct. 1833 ("Congress was justified in concluding that th[e] difficult and intractable problem [of disability discrimination] warranted added prophylactic measures.... The remedy Congress chose is nevertheless a limited one." (alteration and internal quotation marks omitted)); *Hibbs,* 538 U.S. at 738, 123 S.Ct. 1972 ("We also find significant the many other limitations that Congress placed on the scope of [the FMLA].").

* * *

For all of the above reasons, I would hold that Congress explicitly abrogated the States' Eleventh Amendment immunity when it enacted GERA, and that the legislation is congruent and proportional to the racial and gender discrimination that Congress sought to remedy. Accordingly, I would reject Alaska's Eleventh Amendment challenge, and allow the ALJ to rule on the merits of the complainants' claims.

U.S. Equal Employment Opportunity Commission

STATE OF ALASKA, APPELLANT/RESPONDENT,

v.

MARGARET WARD AND LYDIA JONES,
APPELLEES/COMPLAINANTS.

APPEAL 11A40004 & 11A40005[1]
Charge Nos. 380-94-0841 & 380-94-0842

December 14, 2006

DECISION

PROCEDURAL HISTORY

In April 1994, Margaret Ward and Lydia Jones (hereinafter "Complainant Ward" and "Complainant Jones," respectively), former employees of the former Governor of Alaska (hereinafter G1), filed complaints of discrimination against the State of Alaska (hereinafter "the State"). The complaints were filed with the United States Equal Employment Opportunity Commission (EEOC or Commission)

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[1] We note that this is the first time any party herein has appealed to the Commission.

under of the Government Employees Rights Act of 1991 (GERA), 42 U.S.C. §2000e-16a *et seq.*[2] In March 2004, the EEOC referred the complaints to an Administrative Law Judge (ALJ) in accordance with 29 C.F.R. § 1603.201. On January 4, 2005, the ALJ denied the State's motion for summary judgment. On March 9, 2005, pursuant to the State's motion, the ALJ certified his summary judgment rulings for interlocutory review in accordance with 29 C.F.R. § 1603.213.[3] Thereafter, the State filed the instant appeals. For the reasons set forth below, we REMAND for a hearing.

SUMMARY OF RELEVANT FACTS

Complainant Ward was hired in 1991 to be the Director of G1's Anchorage, Alaska office. Complainant Jones was hired in 1991 as Complainant Ward's Special Staff Assistant. On February 11, 1994, Complainant Jones complained to G1's Chief of Staff that she was being sexual harassed by a Special Staff Assistant in G1's Juneau, Alaska office. Jones' allegations of sexual harassment were supported by Complainant Ward. Complainants Jones and Ward were terminated in April 1994.

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[2] GERA extends the rights, protections and remedies of Title VII of the Civil Rights Act of 1964, as amended to employees of elected state and local officials.

[3] The ALJ granted interlocutory review for both complainants in separate decisions.

Complainant Jones alleges sexual harassment and retaliatory termination because of her sexual harassment complaint. Complainant Ward alleges retaliation, claiming G1 terminated her because of her statements supporting Complainant Jones' complaint. The State asserts that, prior to being notified of Complainant Jones' sexual harassment allegations, Complainants Jones and Ward were suspected of using G1's Anchorage office to campaign for G1's rival. It contends that Complainants Ward and Jones were terminated because an investigation revealed that such misconduct had occurred.

On May 23, 2001, Complainant Jones died. Complainant Jones' husband, Kenneth Miller, (hereinafter "Miller") seeks to pursue her claims on her behalf.

CERTIFIED ISSUES

The following issues were certified for interlocutory review pursuant to 29 C.F.R §1603.213(a):

1. Whether the ALJ erred in not summarily dismissing Complainant Jones' complaint pursuant to the State's argument that her claims abated after her death.

2. Whether the ALJ erred in not summarily dismissing the complaints of Complainants Ward and Jones based on the State's laches defense.

3. Whether the ALJ erred in not dismissing the complaints of Complainants Ward and Jones based on the State's assertion of sovereign

immunity under the Eleventh Amendment.

ANALYSIS

Notwithstanding the ALJ's certification of the foregoing issues, it is appropriate to address, preliminarily, the threshold question of whether the instant appeals must be accepted by the Commission. EEOC's GERA regulations arguably *require* an ALJ to certify non final rulings for immediate appeal upon determining that any of the criteria for interlocutory appeal have been met. *See* 29 C.F.R. §1603.213(d) ("The administrative law judge *shall* promptly certify in writing any ruling that qualifies for interlocutory review...."). They further provide that a party may appeal "any matter certified for interlocutory review under §1603.213...." 29 C.F.R.§1603.301. The regulations do not, however, speak, in any direct way, to whether the Commission is required to *accept* any appeal certified under §1603.213.[4]

Section 1603.213(a) prohibits appellate review of non final GERA rulings unless the ALJ determines

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[4]Section 1603.304(b) arguably addresses this issue indirectly to the extent that it states that the Commission "may"issue a decision on an interlocutory appeal or remand a matter to the ALJ without decision. This section, however, appears to speak more directly to the *form* that an interlocutory appeal disposition may take rather than whether such an appeal must be entertained at all. It is unclear, for example, whether the summary *dismissal* of such an appeal (as opposed to the summary "remand" of a "matter") would be covered by subsection 304(b).

that:

1. his/her ruling involves a controlling question of law or policy about which there is substantial ground for difference of opinion;

2. an immediate ruling by the Commission will materially advance the completion of the proceeding; or

3. the denial of an immediate ruling by the Commission will cause irreparable harm to the party or the public.

The foregoing criteria do not precisely mirror the criteria set forth in 28 U.S.C. §1292, the statute governing interlocutory appeals in the federal courts. However, there are similarities.[5] When such is the case, the Commission often finds it useful to look to the standards and practices of the courts when addressing issues not expressly governed by

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[5] Section 1292(b) states in pertinent part:

> When a district court, in making in a civil action, an order not otherwise appealable...shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order....

promulgated policy. *See e.g. Ulloa v. Postal Service*, EEOC Petition No. 04A10032 (December 12, 2001); *Willis v. Treasury*, Request No. 05900589 (July 26, 1990). We find it appropriate to do so here.

We note that a district court's certification of an order for interlocutory appeal does not automatically mean that the appeal will be entertained. Whether that occurs is a matter purely within the discretion of the court of appeals. *See* 28 U.S.C. §1292(b) (stating court of appeals "may" permit appeal from a non final order certified by the district court). We find such a standard appropriate for purposes of orders certified under §1603.213 because it is conceivable that a variety of unpredictable factors could implicate the *wisdom* of reviewing an interlocutory GERA order, even where the ALJ correctly determines that one of the certification criteria has been met. We hold, therefore, that entertaining an appeal filed pursuant to 29 C.F.R § 1603.213 is wholly discretionary on the part of the Commission.

We further note that, in exercising discretion under §1292, federal courts are mindful of the strong policy favoring the deferment of appellate review until *final* judgment is entered in a case. Consistent with that policy, circuit courts have required a showing of exceptional circumstances before granting review of a district court's interlocutory order. *See e.g. In re Prudential Lines, Inc.*, 59 F. 3d 327, 332 (2d Cir. 1995) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)); *see also United States Rubber Company v. Wright*, 359 F. 2d 784, 785 (9th Cir. 1966) (citing 1953 report of the Committee on Appeals from Interlocutory Orders of the District Courts).

In the context of the administrative process, the Commission has similarly acknowledged the benefits of postponing appellate review of an interim ruling in an EEO complaint until after the complaint has been adjudicated completely. *See* 64 Fed. Reg. 37647 (July 12, 1999) (Preamble to rule modifying EEO complaint procedures by *inter alia* eliminating interlocutory appeals). Consistent with this policy, it makes sense for the Commission to adopt the "exceptional circumstances" standard, used by the courts under § 1292, when considering whether to review non final GERA rulings that are otherwise properly certified under §1603.213.

After a thorough review of the record, including the parties' contentions on appeal, we find nothing to indicate that the ALJ's summary judgment rulings were exceptional or that they otherwise involve exceptional circumstances. We therefore decline to entertain the instant appeals.

The ALJ's refusal to dismiss Complainant Jones' claims based on the State's abatement arguments merely reflected his apparent reluctance to apply non jurisdictional time frames rigidly against a *pro se* litigant, in the absence of any evidence of prejudice resulting from Miller's failure to file a motion to replace his wife as a complaining party[6] *See Tatterson v. Koppers Company, Inc.*, 104 F.R.D. 19, 20 (W.D. Pa. 1984) (prejudice a factor to be

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[6] The GERA regulations contain no provision governing the substitution of parties. Therefore, it is not clear that Miller was actually required to file a formal motion.

considered when enlarging time for seeking formal substitution of a party). Given the limited state of the evidentiary record, rendering a decision on whether the ALJ abused his discretion in this regard would be inappropriate.

The ALJ's refusal to dismiss the instant complaints pursuant to the State's laches defense was similarly unremarkable. Nothing in this ruling warrants a deviation from the Commission's policy of limiting appellate review to final decisions. Moreover, the ALJ's finding that there are genuine issues of material fact, relating to the laches defense, would arguably militate against the Commission's ability to review this ruling, even if we were otherwise inclined to do so. *Cf. Johnson v. Jones*, 515 U.S. 304 (1995) (district court's denial of summary judgment based on finding of genuine issues of fact not immediately appealable despite qualified immunity defense).

Finally, the ALJ's refusal to address the sovereign immunity issue provides no basis for entertaining the instant appeals. The State seeks a declaration that EEOC will refrain from exercising jurisdiction over GERA complaints, despite its mandated responsibilities under the Act. No executive branch agency could properly make such a declaration with respect to a statute that it is charged with administering. *Cf. In the Matter of Absalom F. Jordan, Jr. Council of the District of Columbia*, 1 M.S.P.B.R. 78, 82 (1979) ("[A]n agency will not rule on the constitutionality of a statute that it is assigned to administer.") (citation omitted).

CONCLUSION

For all of the foregoing reasons, the Commission hereby REMANDS this matter for hearing. The parties will be notified when an ALJ has been appointed to hear the complaints. After the hearing, the ALJ shall issue a decision in accordance with 29 C.F.R. § 1603.217.

For the Commission:

Stephen Llewellyn
Acting Executive Officer
Executive Secretariat

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARGE NO. 380-94-0841

MARGARET G. WARD, COMPLAINANT,

V.

STATE OF ALASKA, RESPONDENT.

Order Denying Motion for Summary Decision

Filed: January 4, 2005

INTRODUCTION

This case is before me pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq,* as amended by the Government Employee Rights Act of 1991 ("GERA").[1] At issue is a

[1] GERA provides:

> The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policymaking level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.
>
> 42 U.S.C. § 2000e-16(c)

discrimination complaint filed with the Equal Employment Opportunity Commission ("EEOC") by the Complainant, Margaret G. Ward, on April 8, 1994. In her complaint, filed pursuant to 29 C.F.R. § 1603.102,[2] Ward alleges sex discrimination and retaliation, claiming her employer, Governor Walter Hickel, treated her differently than her counterparts because of her sex and that she was terminated by the State of Alaska in April of 1994 in retaliation for making a statement in the sexual harassment charge of another Hickel employee. The Respondent presents affirmative defenses claiming Ward was terminated because she:

> (1) was actively campaigning for one of Governor Hickel's political rivals both in and out of her office; (2) used State of Alaska equipment, employees and resources to prepare and send fundraising mailing lists and correspondence for a rival gubernatorial campaign; (3) caused her office computer and network account to be purged of evidence relating to these activities; (4) had [sic] misused her official

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[2] § 1603.102 Filing a complaint.

(a) Who may make a complaint. Individuals referred to in § 1603.101 who believe (hey have been discriminated against on the basis of race, color, religion, sex, national origin, age or disability or retaliated against for opposing any practice made unlawful by federal laws protecting equal employment opportunity or for participating in any stage of administrative or judicial proceedings under federal laws protecting equal employment opportunity may file a complaint not later than 180 days after the occurrence of the alleged discrimination.

> position for her personal benefit in violation of the Alaska Executive Branch Ethics Act; and (5) was insubordinate and had unduly disrupted the functioning of the Governor's office in Anchorage.
>
> Resp. Br. at 1.

After several procedural events, this case was assigned to the Alternative Dispute Resolution Unit of the EEOC's Seattle District Office on March 20, 2003. On July 30, 2003, the parties held an unsuccessful mediation session. Finally, the EEOC assigned the case to an administrative law judge for hearing, and the Chief Judge of the Federal Mine Safety and Health Review Commission ("the Commission") assigned this case to me.

On August 4, 2004, the Commission, on behalf of the EEOC, received the Respondent's Motion for Summary Decision. In the motion, the Respondent argues for the dismissal of this case for the following reasons:

> (2) Ms. Ward's claims are barred (in whole or in part) by laches and Eleventh Amendment sovereign immunity; (2) Ms. Ward has failed to offer evidence of a prima facie case of retaliation; and (3) Ms. Ward has not offered evidence that the State's legitimate, non-discriminatory and non-retaliatory reasons for her termination were pretextual or otherwise unworthy of belief.
>
> Resp. Br. at 2.

Subsequently, on September 13, 2004, the Commission received the Complainant's opposition to the Respondent's motion. In this rebuttal, the Complainant argues that the motion must be denied for the following reasons:

> (3) She [Ward] was not engaged in any illegal use of State resources or personnel in a political campaign.
>
> (4) Her discharge was retaliatory for her support and protected activity on behalf of a woman who accused the Governor's close aide of sexual harassment.
>
> (5) Her case should not be dismissed for laches due to national policy allowing an employee to pursue her administrative remedies.
>
> (6) If Ward fits under § 321 GERA, her claim is not barred by State sovereign immunity because GERA is part of Title VII and the Civil Rights Act of 1991.
>
> (7) Ward is not excepted from Title VII because she was not a policy maker and did not have a close confidential relationship with the Governor.
>
> (8) Ward has shown both her *prima facie* case and sufficient evidence of pretext so her claim must go to a hearing.
>
> (9) Finally, there is no reason to punish Ward by reducing her back pay if she is successful since

she simply was trying to exhaust her rightful administrative remedies.

Comp. Opp. Br. at 2.

Upon review of the arguments, I conclude that genuine issues of material fact exist, which warrant a trial. Regarding sovereign immunity, I decline to render a decision on the issue, as I question whether jurisdiction to do so exists at this level of jurisprudence. Accordingly, for the reasons articulated below, the Respondent's motion for summary decision is denied.

DISCUSSION

EEOC regulations allow an administrative judge to issue a decision without a hearing when he or she finds no genuine issue of material fact 29 C.F.R. § 1614.109(g).[3] This regulation is patterned after the

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[3] 29 C.F.R. § 1614.109(g):

(g) Decisions without hearing.

If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section.

summary judgment procedure set for in Rule 56 of the Federal Rules of Civil Procedure. *Khatami v. Dept. of Health and Human Services,* 2004 WL 2271177 (E.E.O.C). The Supreme Court has held that:

> Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient

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The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

> disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2505 (1986).

Rule 56 of the Federal Rules of Civil Procedure places the burden of persuasion on the moving party. Summary Judgment should not be granted unless it is clearly shown that a trial is unnecessary. *Celotex Corp. v. Catrett,* 477 U.S. 317, 332, 106 S. Ct. 2548 (1986).

I. Factual Issues

Laches

The Respondent argues that the equitable defense of laches bars the Complainant's claim because more than ten years have passed since the initial filing of the case, and the State is not in the same position it was in ten years ago to defend its case. In particular, witnesses have died; there has been a complete turn-over of staff in the Office of the Governor; many witnesses have retired and no longer reside in the state of Alaska; the whereabouts of important witnesses are unknown; and computer hard drives and other computer storage devices may have been lost or destroyed. Resp. Br. at 20-22. The Respondent also maintains that the Complainant was apparently waiting for the EEOC to promulgate regulations before requesting a hearing pursuant to GERA. However, since the publication of the EEOC's GERA regulations in April of 1997, both the EEOC

and Ward failed to act until after the Respondent made a status inquiry in early 2003. Thus, but for the Respondent's inquiry, this case would still be dormant. Resp. Br. at 20.

In her opposition, the Complainant avers that national policy and persuasive legal authorities allow claims such as hers to proceed at the administrative level, regardless of how long the process takes. Compl. Opp. at 34. Moreover, she contends she had "numerous contacts with the agency regarding the status of her claims, but was told to await the promulgation of the new regulations under GERA § 321 . . . [and that] [i]t was stated that even after the regulations were passed, there were many cases in front of hers." Compl. Opp. Br. at 34. The Complainant contends did not know when those regulations would be promulgated, and even after they were published, she was not notified.

In order to establish a *prima facie* case for the equitable defense of laches, as articulated by the United States Supreme Court, one must prove "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534 (1961). Further, the ninth Circuit has stated, "to establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. Because the application of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible of resolution by summary judgment."

Couveau v. Am. Airlines, 218 F.3d 1078, 1083 (9th Cir.2000).

In light of the test set forth by the Supreme Court, the questions to be resolved are (1) whether the Complainant acted diligently in pursuing her claim, and (2) whether the State has been prejudiced by the delay. Regarding the first prong, the Complainant, in essence, argues that *she* has been diligent in pursuing her claim, but the *EEOC* was negligent in informing her of when to request a hearing. The Respondent argues, however, that the Complainant "did nothing to 'actively pursue' or inquire about her discrimination claims after the EEOC published its GERA regulations." Resp. Reply to Opp. Br. at 8.

The ninth Circuit has held that "for the purpose of laches, we do not generally hold employment discrimination plaintiffs responsible for delays that occur during their pursuit of administrative remedies." *Am. Airlines* 218 F.3d at 1084. While there is no definitive evidence on the record showing that Ward tried to move forward with her case after GERA's promulgation, there is an indication that, upon completion of mediation, it was the EEOC's duty to inform the Complainant of her option to present her case before an administrative law judge. The EEOC's Information Sheet on Section 321 Complaints states, "[i]f mediation is not successful, *EEOC will determine* whether the complainant wishes to obtain an administrative hearing and the complaint will be scheduled for a hearing, if desired." Compl., Ex. 25 pg. 23 (emphasis added). This

language places the burden on the EEOC to find out whether a complainant desires an administrative proceeding, and, if the response is in the affirmative, to schedule the matter for a hearing. There is nothing on the record indicating that the EEOC informed the Complainant of her right to appear before an administrative body. Based upon the factual discrepancies and questions unanswered by the record, at this premature stage I cannot conclude that the Complainant failed to act diligently in pursuing her claim.

Regarding the second prong of the test, although the Respondent makes allegations of prejudice, no affidavits or other evidence have been submitted to support the claim. Therefore, until or unless evidentiary support is presented, at this premature stage I cannot conclude that the Respondent has been prejudiced by the delay.

Retaliation

The Respondent also argues that the Complainant fails to establish a *prima facie* case for retaliation. To establish a *prima facie* for retaliation, the Respondent contends that the Complainant must show she engaged in protected activity, and as a result, suffered an adverse employment action. The Respondent further avers that in addition to the timing of these two events, a causal link must be shown between the two, i.e., the harm suffered must be caused by the complainant's engaged in protected activity. Resp. Br. at 27. In the instant case, the Respondent contends Ward knew she was about to be terminated *before* she engaged in any purported

protected activity, thus there is no causal connection between the termination and alleged protected activity. Resp. Br. at 29.

In her response, the Complainant does not dispute the Respondent's articulation of the elements establishing a *prima facie* case. Compl. Opp. at 53. She does, however, dispute the accusation that there is no causal link between her termination and her engaging in professed protected activity. She contends that, in fact, the State of Alaska began its investigation regarding the misuse of state resources and her supposed illegal participation in a rival campaign *only after* she engaged in protected activity. Compl. Opp. at 59-60.

Based upon the factual discrepancies between the parties regarding the timeline of events surrounding the termination, at this stage I cannot be determine that the Complainant has failed to establish a prima facie case of retaliation. Moreover, reasonable inferences may be drawn from the facts, which must be determined at trial. *See Matsushita Elec. Indus. Co.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986).

Regarding the Respondent's argument that Ward has not offered evidence to suggest that the State's legitimate, non-discriminatory reasons for her termination were pretextual or otherwise unworthy of belief, the issue of pretext is premature without a determination of whether discrimination occurred.

In the interest of justice, it would be unduly harsh to dismiss the complaint in these early

proceedings and deny the complainant a day in court based upon these factually disputed issues. *See Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 515 U.S. 277, 132 (1995) (trial court has discretion to grant or deny declaratory judgment).

II. Legal Issue

The Respondent argues that, even if its aforementioned factual arguments fail, it should prevail as a matter of law because the State of Alaska is immune from private suits under section 321 GERA pursuant to its sovereign immunity under the Eleventh Amendment to the United States Constitution.[4] The Respondent's claim is that the GERA was enacted without reference to the Fourteenth Amendment to the Constitution,[5] the impact being an indication that Congress did not unequivocally abrogate its sovereign immunity. Therefore, the State of Alaska is immune from suit

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[4] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[5] The Fourteenth Amendment provides in pertinent part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

initiated by private individuals under GERA. Resp. Br. at 23.

The Complainant disputes the Respondent's argument, maintaining that the 1991 amendments to the Civil Rights Act of 1964, which include GERA, sought to make the substantive standards of Title VII applicable to state employees. GERA was enacted, Complainant further avers, to protect government employees excepted from Title VII. Compl. Opp. at 45-46. Moreover, as GERA is part and parcel of the Civil Rights Act Amendments of 1991, the State of Alaska's sovereign immunity was abrogated. In the alternative, the Complainant argues that she does not fall under GERA, as she has a valid claim under Title VII. Her employment status with Governor Hickel, she contends, does not fall under the Title VII exception, as she did not have an intimate working relationship with him, nor was she a policy maker. Comp. Opp. Br. at 51-52.

The Respondent rebuts this argument, stating that the Complainant's own written description of her job, describing "herself as has [sic] being the highest authority over all personnel in the Anchorage office" is evidence that she falls within the exception. Resp. Reply Br. at 31-32.

Under Title VII, an "employee" is defined, in pertinent part, as "an individual employed by an employer, *except* that the term 'employee' *shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff.*" 42 U.S.C.A.

§ 2000e(f) (emphasis added). However, Section 321 of GERA, provides that a "member of [an] elected official's personal staff" may file a complaint alleging a violation with the EEOC. 42 U.S.C.A. § 2000e(a)(l), (b)(1).

In deciding whether the State of Alaska is immune from Claimant's private suit under GERA, the initial inquiry is whether GERA was a valid exercise of Congress' power under the commerce clause of the Constitution (Art. I, § 8,c 13). If it is found that GERA is valid under the Commerce clause, then "... the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states" *(Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 72 (1996), quoted in *Kimel v. Florida BD. of Regents,* 528 U.S. 62, 78 (2000).

On the other hand, Section 5 of the Fourteenth Amendment does grant congress the authority to abrogate the states' sovereign immunity *(Kimel,* supra, at 80). Thus an inquiry must be made herein whether GERA can be supported by Congress' power under the Fourteenth Amendment. Further, in *Kimel,* supra, at 73 the Supreme Court set forth the following two-prong inquiry to be made in determining whether Congress validly abrogated the states' immunity when it created rights and remedies pursuant to the Fourteenth Amendment: (1) whether Congress unmistakably expressed its intent to abrogate the immunity in the applicable statutory provision; and (2) if it has done so, whether it had valid constitutional authority to do so. *Kimel v.*

Florida Bd. Of Regents, 528 U.S. 62, 73, 120 S.Ct. 631, 640 (2000).

In evaluating this second prong, it is well established that the ultimate interpretation and determination of the Fourteenth Amendments' substantive meaning remains the province of the Judicial Branch. *Kimel,* supra, at 81. The Supreme Court elaborated as follows:

> In *City of Boerne,* we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects s substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. *Id.,* at 519-520. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining whether [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.,* at 520. *(Kimel, id.)*

Before a deciding body, not within the Judicial Branch, makes a determination relating to Congressional intent, or whether legislation is remedial or a substantive redefinition of the Fourteenth Amendment, it must have the jurisdiction to do so. I have found no indication that an administrative law judge, employed by an executive agency, possesses such jurisdiction nor has the Respondent presented such an argument. *See In*

re United States Air Force Tinker Air Force Base, No. UST-6-98-002-AO-1, 1999 WL 362884 (E.P.A. May 19, 1999). Without an explicit statutory, regulatory, or decisional grant of authority, I can not entertain Respondent's claim of state immunity as it involves deciding the intent of Congress, and matters more appropriate to be determined by the Judicial Branch.

Regarding Complainant's alternative argument that she is entitled to Title VII coverage, the interpretation of facts requires an analysis that is only appropriate in a trial setting.

Therefore, for all the above reasons, the Respondent's Motion for Summary Decision is **DENIED**.

/Avram Weisberger

Administrative Law Judge

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARGE NO. 380-94-0841

MARGARET G. WARD, COMPLAINANT,

v.

STATE OF ALASKA, RESPONDENT.

Order Granting Certification for Interlocutory Review
Order Denying Request for Reconsideration
Order Granting Motion for Stay

Filed: March 9, 2005

BACKGROUND

On January 4, 2005, I issued an order denying the Respondent's motion for summary decision in the above captioned case. In that order, I declined to render a decision on Eleventh Amendment sovereign immunity because I questioned whether I had jurisdictional authority to rule on Congressional intent as required by the two-pronged test set forth by the Supreme Court in *Kimbel v. Florida Bd. Of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 640 (2000). In addition, I concluded that genuine issues of material fact exist – including those pertaining to laches – warranting a trial.

Subsequently, on January 13, 2005, the Respondent filed an Application For Interlocutory Review and Stay and Request for Reconsideration,

arguing, in general, two points: (1) I erred in declining to rule on the issue of Sovereign Immunity – a controlling question of law and policy; and (2) I erred in determining that there was insufficient evidence to make a ruling on the issue of laches in that I failed to address evidence on the record, and I failed to address "the rule of law that the EEOC's publications of its GERA regulations in the Federal Register is legally sufficient notice to [the Complainant]," Resp. App. at 3-4, 7-8. The Respondent requests a stay pending an appeal "[b]ecause of the 'insult' the State of Alaska would incur if this case were to proceed to hearing." *Id.* at 5.

The Complainant then filed an opposition to the Respondent's application, stating the Respondent has not met the required ground for interlocutory review set forth in 29 C.F.R. § 1603.213(a). The Respondent subsequently filed a response to the opposition.

In light of all the arguments presented, I certify my Order Denying Summary Decision for interlocutory review on the grounds of jurisdiction and laches; I deny the request for reconsideration; and I grant the Respondent's motion for stay of proceedings. As I have reviewed the parties' written arguments, an oral argument is unnecessary.

DISCUSSION

Under EEOC regulations:

(a) Interlocutory review may not be sought except when the administrative law judge determines upon motion of a party or upon

his or her own motion that:

(1) The ruling involves a controlling question of law or policy about which there is substantial ground for difference of opinion;

(2) An immediate ruling will materially advance the completion of the proceeding; or

(3) The denial of an immediate ruling will cause irreparable harm to the party or to the public.

29 C.F.R. § 1603.213(a)

Regarding Eleventh Amendment sovereign immunity, I agree that this issue is one involving a controlling question of law about which there is substantial ground for difference of opinion. The ninth circuit has defined a "controlling" question of law to mean "that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.1982). A finding that the State of Alaska is immune from the instant suit would, in essence, dispose of the entire case, hence, materially affecting the outcome of the case and rendering any substantive discussion moot. Moreover, as the parties' briefs show, there is substantial ground for differing opinions. Thus, this despositive issue must be resolved prior to any further analysis of the merits of the case. Upon reading the Eleventh Amendment, the applicable

case law, and other legal sources, I still find the complex issue of determining Congressional intent, as required by test set forth in *Kimbel*, would be more appropriately determined by the Judicial Branch, and not by the Executive Branch, of which an administrative law judge is a part.

With regard to laches, while it may seem that this issue is solely factual, the Respondent is accurate in its argument that there are also legal implications, particularly as they relate to the interpretation of EEOC rules promulgated in 29 C.F.R. § 1603.201(a) and (b). If it is found that the burden was on the Complainant to pursue a hearing rather than the Respondent, a deciding body could determine that laches applies, which would, in effect, materially advance the completion of the proceeding by disposing of the case.

In its application, the Respondent makes specific arguments that I neglected the Supreme Court's decision in *Federal Maritime Comm'n v. South Carolina State Ports,* 535 U.S. 743, 760-61, 122 S. Ct. 1864, 1874-75 (2002), and that I ignored evidence on the record. I decline to address those arguments as they are not germane to this disposition.

ORDERS

In light of the foregoing, I **CERTIFY** my Order Denying Summary Decision for interlocutory review on the issues of jurisdiction and laches and **DENY** the request for reconsideration. In addition, this proceeding is **STAYED** pending appeal pursuant to 29 C.F.R. § 1603.213(e).

/Avram Weisberger

Administrative Law Judge

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARGE NO. 380-94-0841

LYDIA JONES, COMPLAINANT

V.

STATE OF ALASKA, RESPONDENT

Order Denying Motion for Summary Decision

Filed: January 4, 2005

Introduction

This case is before me pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*, as amended by the Government Employee Rights Act of 1991("GERA").[1] At issue is a

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[1] GERA provides:

The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof–

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

discrimination complaint filed with the Equal Employment Opportunity Commission ("EEOC") by the Complainant, Lydia Jones, on April 8, 1994. In her complaint, filed pursuant to 29 C.F.R. § 1603.102,[2] Jones alleges that the state of Alaska violated her Title VII right to be free of sexual and racial discrimination in the workplace. She claims that John Hendrickson, Special Staff Assistant to Jones's employer, Governor Walter Hickel, subjected her to ongoing sexual and discriminatory harassment, which began soon after Hendrickson's hiring in 1991. She further claims she was paid less than her male counterparts because of her sex, female, and race, African-American. Finally, she contends that she was discharged of her employment as retaliation for reporting the alleged harassment. Jones died of cancer in May 2001, and her husband, Kenneth Miller, seeks to proceed with this case on her behalf. In response to the complaint, the Respondent presents affirmative defenses, claiming Jones was terminated because she:

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42 U.S.C. §2000e-16(c)

[2] § 1603.102 Filing a complaint.

(a) Who may make a complaint. Individuals referred to in § 1603.101 who believe they have been discriminated against on the basis of race, color, religion, sex. national origin, age or disability or retaliated against for opposing any practice made unlawful by federal laws protecting equal employment opportunity or for participating in any stage of administrative or judicial proceedings under federal laws protecting equal employment opportunity may file a complaint not later than 180 days after the occurrence of the alleged discrimination.

> (1) was actively campaigning for one of Governor Hickel's political rivals both in and out of her office, (2) used State of Alaska equipment, employees and resources to prepare fundraising mailing lists and send correspondence for the political rival's campaign; (3) caused her office computer and network account to be purged of evidence relating to these activities; (4) misused her official position; and (5) was insubordinate and had unduly disrupted the functioning of the Governor's office in Anchorage.

Resp. Br. at 1.

After a several procedural events, this case was assigned to the Alternative Dispute Resolution Unit of the EEOC's Seattle District Office on March 20, 2003. On July 30, 2003, the parties held an unsuccessful mediation session. Finally, the EEOC assigned the case to an administrative law judge for hearing, and the Chief Judge of the Federal Mine Safety and Health Review Commission ("the Commission") assigned this case to me.

On August 4, 2004, the Commission, on behalf of the EEOC, received the Respondent's Motion for Summary Decision. In the motion, the Respondent argues for the dismissal of this case for the following reasons:

> (1) Ms. Jones's claims abated two years after her death; (2) her claims are barred in whole (or in part) by laches and

> Eleventh Amendment immunity; (3) that she fails to offer evidence of a prima facie case of discrimination, harassment, or retaliation; and (4) she has not offered evidence to suggest that the State's legitimate, non-discriminatory reasons for her termination were pretextual or otherwise unworthy of belief.

Resp. Br. at 2.

Subsequently, the Commission received a reply from Miller via counsel, in which he claims to have been appointed Special Administrator "well within the two (2) years required by Alaska's Survival Statute" and that the "State of Alaska began their [sic] investigation into the improper use of the Governors [sic] Office Equipment as a possible retaliatory action."[3] Compl. Opp. at 1. Finally, on August 27, 2004, the Commission received the Respondent's Reply to Opposition to Motion for Summary Judgment, in which the Respondent states that the Complainant "barely addresses the merits of the case, offers nothing but speculation about whether any genuine issue of facts exist, and offers nothing to rebut the State of Alaska's statement of a legitimate, non-discriminatory reason for Ms. Jones'[s] discharge." Resp. Reply to Opp. at 2.

Upon review of the arguments, I conclude that

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[3] Essentially, Miller is a *pro se* litigant, as counsel appears only for the limited purpose of filing this letter.

genuine issues of material fact exist, which warrant a trial. Regarding sovereign immunity, I decline to render a decision on the issue, as I question whether jurisdiction to do so exists at this level of jurisprudence. Accordingly, for the reasons set forth below, I deny the Respondent's Motion for Summary Judgment.

Discussion

EEOC regulations allow an administrative law judge to issue a decision without a hearing when he or she finds no genuine issue of material fact 29 C.F.R. § 1614.109(g).[4] This regulation is patterned

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[4] 29 C.F.R. § 1614.109(g):

(g) Decisions without hearing.

(1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer lo the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to

after the summary judgment procedure set for in Rule 56 of the Federal Rules of Civil Procedure. *Khatami v. Dept. of Health and Human Services*, No. 120-2003-0026X, 2004 WL 2271177 (E.E.O.C. Sept. 30, 2004). The Supreme Court has held that:

> Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

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the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

Anderson v, Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2505 (1986).

Rule 56 of the Federal Rules of Civil Procedure places the burden of persuasion on the moving party. Summary Judgment should not be granted unless it is clearly shown that a trial is unnecessary. *Celotex Corp. v. Catrett*, 477 U.S. 317, 332, 106 S.Ct. 2548 (1986).

I. FACTUAL ISSUES

The Respondent first contends that Jones's claim abated after two years. No personal representative of Ms. Jones's estate moved to be substituted on her behalf within two years of her death, and thus, Ms. Jones's claims abated and were extinguished. The Respondent argues that the survivability and abatement of a decedent's claims are governed by the local state's survival and abatement statute, stating that according to Alaska's Survival Statute, the court may, at any time within two years after a death, allow the action to be continued. *See* AS 09.15.040.

In his rebuttal, Miller claims he was not aware of the existence of Jones's case until February 2003, that he was appointed Special Administrator shortly after her death, and that his attorney closed the

probate in 2003, all within the two years required by Alaska's Survival Statute.[5] Compl. Opp. at 1.

Second, the Respondent argues that the equitable defense of laches bars Jones's claim because ten years have passed since the initial filing of the case, and the State is not in the same position it was in ten years ago to defend its case. In particular, the Respondent avers that aside from Jones herself, witnesses have died; other witnesses are significantly older; many witnesses have retired, resigned, or no longer reside in the state of Alaska; and evidence may have been lost or destroyed. Resp. Br. at 12-24.

In his rebuttal, Miller admits that the "*EEOC* has failed miserably on how they've handled this case" and that "[i]f they hadn't waited 10 years to assign the case to an administrative law judge, my wife or I would have had a fair chance in this case." Compl. Opp. at 3 (emphasis added). However, Miller asserts that he has had difficulty acquiring legal counsel and that since both his wife and her attorney are now deceased, he has not been able to get any factual information about this case.

Finally, the Respondent states that Jones fails to establish a *prima facie* case for discrimination or retaliation. In addition, the Respondent avers, Jones has not offered evidence to suggest that the State's

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[5] The rebuttal letter is unclear as to whether the attorney who handled the probate matter is the same attorney who wrote this letter.

legitimate, non-discriminatory reasons for her termination were pretextual or otherwise unworthy of belief.

Miller has not addressed these arguments.

The Respondent is the party moving for summary decision, and as such, has the burden of establishing its right to a summary decision. Based upon the factual disputes between the parties, I conclude that these issues present sufficient disagreements to require a trial, particularly since Miller is appearing *pro se* and does not have the benefit of counsel to adequately argue his claims. *See Haines v. Kerner*, 404 U.S. 519, 520, 520-521 (1972) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 [78 S.Ct. 99, 101-102, 2 L.Ed.2d 80] (1957)(Supreme Court held that a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and may only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). In the interest of justice, it would be unduly harsh to dismiss the complaint in these early proceedings and deny the Complainant a day in court based upon these factually disputed issues. *See Wilton v. Seven Falls Co.*, 115 S.Ct. 2137, 515 U.S. 277, 132, L.Ed.2d 214 (1995)(trial court has discretion to grant or deny declaratory judgment).

II. LEGAL ISSUE

The Respondent argues that even if its aforementioned factual arguments fail, it should

prevail as a matter of law because the State of Alaska is immune from private suits under section 321 GERA pursuant to its sovereign immunity under the Eleventh Amendment to the United States Constitution.[6] The Respondent's claim is that GERA was enacted without reference to the Fourteenth Amendment to the Constitution,[7] the impact being an indication that Congress did not unequivocally abrogate its sovereign immunity. Therefore, the State of Alaska is immune from suit initiated by private individuals under GERA.

Under Title VII, an "employee" is defined, in pertinent part, as "an individual employed by an employer, *except* that the term 'employee' *shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff.*" 42. U.S.C.A. § 2000e(f)(emphasis added). However, section 321 of GERA, provides that a "member of [an] elected

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[6] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[7] The Fourteenth Amendment provides in pertinent part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

official's personal staff" may file a complaint alleging a violation with the EEOC. 42 U.S.C.A. § 2000e(a)(1), (b)(1).

In deciding whether the State of Alaska is immune from Claimant's private suit under GERA, the initial inquiry is whether GERA was a valid exercise of Congress' power under the commerce clause of the Constitution (Art. I, § 8,c 13). If it is found that GERA is valid under the Commerce clause, then "...the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states" (*Seminole Tribe of Fla. v. Florida* 517 U.S. 44, 72 (1996), quoted in *Kimel v. Florida BD. of Regents* 528 U.S. 62, 78 (2000).

On the other hand, Section 5 of the Fourteenth Amendment does grant congress the authority to abrogate the states' sovereign immunity (*Kimel*, supra, at 80). Thus an inquiry must be made herein whether GERA can be supported by Congress' power under the Fourteenth Amendment. Further, in *Kimel*, supra, at 73 the Supreme Court set forth the following two-prong inquiry to be made in determining whether Congress validly abrogated the states' immunity when it created rights and remedies pursuant to the Fourteenth Amendment: (1) whether Congress unmistakably expressed its intent to abrogate the immunity in the applicable statutory provision; and (2) if it has done so, whether it had valid constitutional authority to do so. *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 640 (2000).

In evaluating this second prong, it is well established that the ultimate interpretation and determination of the Fourteenth Amendments' substantive meaning remains the province of the Judicial Branch. *Kimel*, supra, at 81. The Supreme Court elaborated as follows:

> In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects s substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. *Id.*, at 519-520. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining whether [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520. (*Kimel*, *id.*)

Before a deciding body, not within the Judicial Branch, makes a determination relating to Congressional intent, or whether legislation is remedial or a substantive redefinition of the Fourteenth Amendment, it must have the jurisdiction to do so. I have found no indication that an administrative law judge, employed by an executive agency, possesses such jurisdiction nor has the Respondent presented such an argument. *See In re United States Air Force Tinker Air Force Base*, No.

UST-6-98-002-AO-1. 1999 WL 362884 (E.P.A. May 19, 1999). Without an explicit statutory, regulatory, or decisional grant of authority, I can not entertain Respondent's claim of state immunity as it involves deciding the intent of Congress, and matters more appropriate to be determined by the Judicial Branch.

Therefore, for all the above reasons, the Respondent's Motion for Summary Decision is **DENIED**.

/Avram Weisberger

Administrative Law Judge

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARGE NO. 380-94-0842

LYDIA JONES, COMPLAINANT

V.

STATE OF ALASKA, RESPONDENT

Order Granting Certification for Interlocutory Review
Order Denying Request for Reconsideration
Order Granting Motion for Stay

Filed: March 9, 2005

BACKGROUND

On January 4, 2005, I issued an order denying the Respondent's motion for summary decision in the above captioned case. In that order, I declined to render a decision on Eleventh Amendment sovereign immunity because I questioned whether I had jurisdictional authority to rule on Congressional intent as required by the two-pronged test set forth by the Supreme Court in *Kimbel v. Florida Bd. Of Regents,* 528 U.S. 62, 73, 120 S. Ct. 631, 640 (2000). In addition, I concluded that genuine issues of material fact exist – including those pertaining to abatement and laches – warranting a trial.

Subsequently, on January 14, 2005, the Respondent filed an Application For Interlocutory Review and Stay and Request for Reconsideration,

arguing, in general, three points: (1) I erred in declining to rule on the issue of Sovereign Immunity – a controlling question of law and policy; (2) I inadequately ruled on the issue of abatement because I neglected to address the legal issue of standing; and (3) I erred in determining that there was insufficient evidence to make a ruling on the issue of laches as there was a 10 year delay before the case was assigned to an administrative law judge. Ms. Jones was not a *pro se* complainant during the 180 period, the Respondent asserts, and she should have diligently pursued her claim. Resp. App. at 3-4, 6-8. The Respondent requests a stay pending an appeal. *Id.* at 9.

In light of all the arguments presented, 1 certify my Order Denying Summary Decision for interlocutory review on the grounds of jurisdiction, abatement, and laches; I deny the request for reconsideration; and I grant the Respondent's motion for stay of proceedings.

DISCUSSION

Under EEOC regulations:

(a) Interlocutory review may not be sought except when the administrative law judge determines upon motion of a party or upon his or her own motion that:

(1) The ruling involves a controlling question of law or policy about which there is substantial ground for difference of opinion;

(2) An immediate ruling will materially advance the completion of the proceeding; or

(3) The denial of an immediate ruling will cause irreparable harm to the party or to the public.

29 C.F.R. § 1603.213(a)

Regarding Eleventh Amendment sovereign immunity, I agree that this issue is one involving a controlling question of law about which there is substantial ground for difference of opinion. The ninth circuit has defined a "controlling" question of law to mean "that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation,* 673 F.2d 1020, 1026 (9th Cir. 1982). A finding that the State of Alaska is immune from the instant suit would, in essence, dispose of the entire case, hence, materially affecting the outcome of the case and rendering any substantive discussion moot. Moreover, this issue presents substantial ground for differing opinions. Thus, this despositive issue must be resolved prior to any further analysis of the merits of the case. Upon reading the Eleventh Amendment, the applicable case law, and other legal sources, I still find the complex issue of determining Congressional intent, as required by test set forth in *Kimbel,* would be more appropriately determined by the Judicial Branch, and not by the Executive Branch, of which an administrative law judge is a part.

With regard to abatement and laches, while it

may seem that these issues are solely factual, the Respondent is accurate in its argument that there are also legal implications, particularly as they relate to Mr. Miller's standing, or the lack thereof, and the application of 29 C.F.R. § 1603.201(b). If it is found that Mr. Miller has no standing or that laches applies, these rulings would materially advance the completion of the proceeding by disposing of the case.

In its application, the Respondent makes specific arguments that I neglected the Supreme Court's decision in *Federal Maritime Comm'n v. South Carolina State Ports,* 535 U.S. 743, 760-61, 122 S. Ct. 1864, 1874-75 (2002), and that I ignored evidence on the record. I decline to address those arguments as they are not germane to this disposition.

ORDERS

In light of the foregoing, I **CERTIFY** my Order Denying Summary Decision for interlocutory review on the issues of jurisdiction, abatement, and laches and **DENY** the request for reconsideration. In addition, this proceeding is **STAYED** pending appeal pursuant to 29 C.F.R. § 1603.213(e).

/Avram Weisberger

Administrative Law Judge

United States Constitution Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 42. The Public Health and Welfare

Chapter 21. Civil Rights

Subchapter VI. Equal Employment Opportunities

§2000e-16a. Short title; purpose; definition

(a) Short title

Sections 2000e-16a to 2000e-16c of this title may be cited as the "Government Employee Rights Act of 1991".

(b) Purpose

The purpose of sections 2000e-16a to 2000e-16c of this title is to provide procedures to protect the rights of certain government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) "Violation" defined

For purposes of sections 2000e-16a to 2000e-16c of this title, the term "violation" means a practice that violates section 2000e-16b(a) of this title.

§ 2000e-16b. Discriminatory practices prohibited

(a) Practices

All personnel actions affecting the Presidential appointees described in section 1219 of Title 2 or the State employees described in section 2000e-16c of this title shall be made free from any discrimination based on--

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title;

(2) age, within the meaning of section 633a of Title 29; or

(3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of this title.

(b) Remedies

The remedies referred to in sections 1219(a)(1) of Title 2 and 2000e-16c(a) of this title--

(1) may include, in the case of a determination that a violation of subsection (a)(1) or (a)(3) of this section has occurred, such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title;

(2) may include, in the case of a determination that a violation of subsection (a)(2) of this section has occurred, such remedies as would be appropriate if awarded under section 633a(c) of Title 29; and

(3) may not include punitive damages.

§2000e-16c. Coverage of previously exempt State employees

(a) Application

The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof--

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by administrative action

(1) In general

Any individual referred to in subsection (a) of this section may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5, shall determine whether a violation has occurred and shall set forth its

determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State and local authorities

(A) Application

Section 2000e-5(d) of this title shall apply with respect to any proceeding under this section.

(B) Definition

For purposes of the application described in subparagraph (A), the term "any charge filed by a member of the Commission alleging an unlawful employment practice" means a complaint filed under this section.

(c) Judicial review

Any party aggrieved by a final order under subsection (b) of this section may obtain a review of such order under chapter 158 of Title 28. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of Title 28.

(d) Standard of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional

and statutory provisions. The court shall set aside a final order under subsection (b) of this section if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(c) Attorney's fees

If the individual referred to in subsection (a) of this section is the prevailing party in a proceeding under this subsection[1], attorney's fees may be allowed by the court in accordance with the standards prescribed under section 2000e-5(k) of this title.

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[1] So in original.

No. 09-384

In the Supreme Court of the United States

OFFICE OF ALASKA GOVERNOR, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's decision in *United States* v. *Georgia*, 546 U.S. 151 (2006), to hold that the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e-16a *et seq.*, validly abrogated the State's sovereign immunity with respect to Margaret Ward's allegations of retaliatory discharge because such allegations stated a claim under the First Amendment.

2. Whether the court of appeals correctly held that Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting GERA to provide coverage to "State employees" "previously exempt" under Title VII of the Civil Rights Act of 1964.

3. Whether Congress validly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment when it extended the protections of Title VII to previously-excluded state employees.

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In the Supreme Court of the United States

No. 09-384

OFFICE OF ALASKA GOVERNOR, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-55a) is reported at 564 F.3d 1062. The panel opinion of the court of appeals (Pet. App. 56a-90a) is reported at 508 F.3d 476. The decision of the United States Equal Employment Opportunity Commission (Pet. App. 91a-99a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. On July 17, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 14, 2009. On September 9, 2009, Justice Kennedy further extended the time to September 28, 2009, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071, was enacted "to ensure that all persons enjoy full and adequate protection against employment discrimination." H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 2 (1991). The Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e-16a *et seq.*, enacted as part of the Civil Rights Act of 1991, prohibits, *inter alia*, employment discrimination against certain state employees previously excluded from coverage under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[1]

GERA applies to "any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policy-making level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office."

42 U.S.C. 2000e-16c(a). That section is entitled "[c]overage of previously exempt State employees." 42 U.S.C. 2000e-16c.

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[1] The relevant provisions of GERA were originally codified at 2 U.S.C. 1202 and 1220 (Supp. III 1991), but were transferred, as amended, to 42 U.S.C. 2000e-16a *et seq.*

These "previously exempt State employees" are entitled to the "rights, protections, and remedies provided pursuant to section 2000e-16b of this title." 42 U.S.C. 2000e-16c(a). Section 2000e-16b(a)(1), in turn, provides that "[a]ll personnel actions affecting" such state appointees "shall be made free from any discrimination" based on "race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title." 42 U.S.C. 2000e-16b(a)(1). Thus, in defining the "rights" and "protections" afforded to covered state employees, GERA expressly incorporates the standards of 42 U.S.C. 2000e-16, which permits claims of employment discrimination to be brought against the federal government, 42 U.S.C. 2000e-16(c).

As for "remedies," Section 2000e-16b(b) provides that they "may include * * * such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title." 42 U.S.C. 2000e-16b(b)(1). Section 2000e-5(g), in turn, permits "back pay (payable by the employer * * * responsible for the unlawful employment practice)." 42 U.S.C. 2000e-5(g)(1). Section 1981a permits recovery of compensatory damages "against a respondent who engaged in unlawful intentional discrimination." 42 U.S.C. 1981a(a).

Any covered state appointee under GERA may file a complaint with the Equal Employment Opportunity Commission (EEOC), and the agency "shall determine whether a violation has occurred" and, if so, "shall also provide for appropriate relief." 42 U.S.C. 2000e-16c(b)(1). The EEOC, prior to acting on a complaint, must refer it to any state or local fair employ-

ment practices (FEP) agency authorized by state or local law "to grant or seek relief from" the alleged discrimination. 42 U.S.C. 2000e-5(d) (incorporated by 42 U.S.C. 2000e-16c(b)(2)(A)). And, upon request by the State or local agency, the EEOC must provide that agency "a reasonable time, but not less than sixty days * * * to act under such State or local law to remedy the practice alleged." *Ibid.* (incorporated by 42 U.S.C. 2000e-16c(b)(2)(A)).

Any party aggrieved by an EEOC final order under GERA may petition the court of appeals for review under the Hobbs Act, 28 U.S.C. 158. 42 U.S.C. 2000e-16c(c).

2. This action arose out of discrimination complaints filed with the EEOC in April 1994, by Lydia Jones and Margaret Ward against petitioner, the Office of the Alaska Governor.[2] Pet. App. 2a, 91a. Jones and Ward were employed by the former Governor of Alaska, Walter Hickel, and were terminated under disputed circumstances. *Ibid.* Ward served as Director of the Governor's Anchorage office; Jones was a Special Staff Assistant in that office. *Id.* at 92a. The EEOC processed both complaints under GERA.[3] *Id.* at 91a-92a.

Jones alleged that the State paid her less due to her sex and race, that she was sexually harassed by another

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[2] Jones died while the case was pending before the EEOC. Her husband, proceeding pro se, sought to pursue the claims on her behalf before the administrative law judge, but did not intervene in the Ninth Circuit appeal. Gov't C.A. Br. 2 n.2.

[3] Ward argued that she was entitled to coverage under Title VII, not GERA, because she was not "a policy maker and did not have a close confidential relationship with the Governor." Pet. App. 103a. The administrative law judge reserved ruling on the appropriate statutory framework. *Id.* at 115a.

Special Staff Assistant, and that the State discharged her in retaliation for complaints of such discriminatory harassment. Pet. App. 122a; C.A. E.R. 9, 29-30. Ward alleged that she was discriminated against due to her sex, and that the State terminated her employment in retaliation for supporting Jones's harassment complaint. Pet. App. 101a; C.A. E.R. 4, 16.

The EEOC referred the complaints to an administrative law judge (ALJ). The State filed motions for summary decision asserting abatement of Jones's claims after her death, laches, and Eleventh Amendment immunity, and seeking dismissal of Ward's and Jones's retaliation claims on their merits. Pet. App. 102a, 123a-124a. The ALJ denied the State's motions in their entirety after concluding that he lacked jurisdiction to decide the sovereign immunity issue, and that there were material factual disputes that could not be properly resolved "in these early proceedings." *Id.* at 100a-115a, 121a-133a. The ALJ certified an interlocutory appeal to the EEOC on, *inter alia*, the Eleventh Amendment immunity issue; petitioner did not seek and the ALJ did not certify interlocutory review on the merits of the retaliation claims. *Id.* at 116a-120a, 134a-137a. The EEOC declined to entertain the interlocutory appeals and remanded for a hearing. *Id.* at 91a-99a. That hearing has not yet occurred and the EEOC has not yet addressed the merits of Ward's and Jones's claims.

The proceedings before the ALJ were suspended because Alaska filed a petition for review in the court of appeals alleging Eleventh Amendment immunity from suit. Pet. App. 2a.

3. The court of appeals deemed the denial of Eleventh Amendment immunity to be an appealable collateral order and exercised jurisdiction over the interlocu-

tory appeal. Pet. App. 59a. On November 8, 2007, in a split decision, the court of appeals held that GERA did not validly abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. *Id.* at 56a-90a. The court did not dispute that Congress clearly expressed its intent to abrogate state sovereign immunity. See *id.* at 60a. Instead, Judge Noonan, writing for the court, concluded that Congress made no specific findings with respect to discrimination by states against high-level employees and, for that reason, GERA was not "a proportionate response to a widespread evil." *Id.* at 65a. Judge Wallace concurred. *Id.* at 65a-68a.

In dissent, Judge Paez had "no serious doubt" that Congress expressed its unequivocal intent in GERA to abrogate state sovereign immunity, and concluded that such abrogation was a valid exercise of Congress's authority under the Fourteenth Amendment. Pet. App. 68a-90a.

4. The court of appeals granted rehearing en banc, held that Congress validly abrogated the State's sovereign immunity in GERA with respect to the particular claims at issue in this case, and remanded for further proceedings. Pet. App. 1a-55a.

a. In his opinion for the court, Chief Judge Kozinski, joined by six other judges, held that Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting GERA. Pet. App. 4a-7a. Looking to the statutory text, the court concluded that "GERA expressly covers state employees, and expressly gives them a right to collect damages 'payable *by the employer*'—the state." *Id.* at 5a (quoting 42 U.S.C. 2000e-5(g)(1)).

The court then held that GERA was a proper exercise of Congress's power under Section 5 of the Four-

teenth Amendment under *United States* v. *Georgia*, 546 U.S. 151 (2006), because all of the alleged GERA claims in this case encompassed actual violations of the Fourteenth Amendment. Pet. App. 8a. Recognizing that "[t]he merits of these claims (and Alaska's various defenses) aren't before us," the court "consider[ed] only whether each claim alleges conduct that, if it occurred and wasn't justified by a valid defense, would have violated the Fourteenth Amendment." *Id.* at 8a-9a.

First, the court held that "[t]he alleged pay discrimination, if it happened, denied Jones and Ward equal protection of the law." Pet. App. 9a. *Second*, the court construed Jones's sexual harassment claim to allege intentional discrimination by the State and, as such, concluded it also stated a claim for violation of her equal protection rights. *Id.* at 10a-12a. *Third*, the court held that Ward's retaliation allegations stated a claim under the First Amendment, as incorporated into the Due Process Clause of the Fourteenth Amendment. *Id.* at 12a-15a. Based on Ward's allegations, the court found that she was speaking as a private citizen on a matter of public concern when she "held a press conference to protest what she saw as sex discrimination in the Governor's Office." *Id.* at 14a. The court did not opine on "[w]hether Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest," nor did it decide whether Ward could prevail on such a hypothetical First Amendment claim—or even whether she could prevail on the merits of her GERA retaliation claim. *Id.* at 15a n.7; see also *id.* at 12a n.6 (acknowledging that "Ward is not seeking relief directly under the First Amendment," and leaving it to the EEOC "in the first instance" to decide whether she could succeed on her retaliation claim under GERA).

Because "[e]ach of Jones and Ward's claims allege actual violations of the Fourteenth Amendment," the court held that Congress had validly abrogated the State's sovereign immunity with respect to the claims at issue in this case, rendering it unnecessary to determine whether GERA was valid prophylactic legislation. Pet. App. 16a.

b. Judge O'Scannlain concurred in part and dissented in part. Pet. App. 16a-33a. He agreed with the majority that the sex discrimination claims stated violations of the Equal Protection Clause. *Id.* at 16a. Judge O'Scannlain also agreed that Congress's intent to abrogate state sovereign immunity in GERA was sufficiently clear. *Id.* at 17a. In his view, however, Ward's retaliation claim did not allege a First Amendment violation. *Id.* at 21a-28a. Judge O'Scannlain would have ruled that the decision to discharge Ward after she presented "one side of an internal struggle among the Governor's policy aides" at a press conference was "a classic employment decision of the kind [this] Court has warned should not bec[o]me a constitutional matter." *Id.* at 26a-27a (second set of brackets in original; internal quotation marks and citation omitted).

Judge O'Scannlain then analyzed whether GERA is valid prophylactic legislation that is congruent and proportional to the harm Congress intended to prevent, and concluded that because Congress did not document a "pattern of unconstitutional discrimination at the policy-making level of state and local employment," it was not. Pet. App. 28a-33a.

c. Judge Ikuta, joined by two other judges, dissented on the ground that Congress had not unequivocally expressed its intent to abrogate state sovereign immunity in enacting GERA. Pet. App. 33a-55a. The

dissent would have held that GERA does not contain the requisite clear statement of congressional intent because it does not "explicitly provide that it intends to abrogate state sovereign (or Eleventh Amendment) immunity" in so many words,"it does not specify states as potential defendants," and it does not "create a statutory scheme under which states are the only possible defendants." *Id.* at 34a, 39a-41a.

ARGUMENT

Petitioner argues that this Court should grant certiorari on the three questions presented because of perceived conflicts with this Court's decisions and, with respect to the First Amendment holding, other courts of appeals, and because of overarching federalism concerns. This case comes to the Court in an interlocutory posture and on an undeveloped factual record. The State will appear before the EEOC to defend the equal pay and sexual harassment charges regardless of how the first and third questions presented are resolved. And the second question presented is one of first impression that has given rise to no conflict and was correctly decided. This case presents a remarkably unsuitable vehicle to resolve any confusion over this Court's recent decision in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), and this appears to be the first and only court case since 1991 to challenge the abrogation of state sovereign immunity under GERA. Further review is not warranted at this time.

1. The only question that would dispose of the entire case if decided in petitioner's favor, and thus truly immunize the State from suit, is the second question presented: whether Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting

GERA. The en banc court's holding on that issue is correct and does not conflict with any decision of this Court or any other court of appeals.

a. This case marks the first time a court has considered whether Congress abrogated state sovereign immunity in enacting GERA in 1991. Thus, in the nearly two decades that followed its passage, no other court of appeals has opined on whether GERA clearly and unequivocally expresses Congress's intent to abrogate state sovereign immunity. Indeed, the panel majority below did not address the clear statement issue, nor did petitioner squarely raise it.[4] Unlike the other Eleventh Amendment cases this Court has granted in recent years, this issue has engendered virtually no litigation and there is no conflict to resolve. See, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 725-726 (2003) (granting certiorari to resolve conflict); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 363 (2001) (same); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 72 (2000) (same); *Dellmuth* v. *Muth*, 491 U.S. 223, 227 (1989) (same); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 237 (1985) (*Atascadero*) (same). In these circumstances, further percolation is warranted.

b. The en banc court of appeals correctly held that Congress "unequivocally expressed its intent," *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004) (quoting *Kimel*, 528

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[4] In its brief before the Ninth Circuit panel (Pet. C.A. Br. 27-28), petitioner appeared to confuse the requirement that Congress demonstrate a clear intent to abrogate state sovereign immunity with the "congruence and proportionality" test under *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Nowhere in its panel or rehearing briefs did petitioner cite *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), or *Dellmuth* v. *Muth*, 491 U.S. 223 (1989), the precedent petitioner now contends the court of appeals' decision "defies." Pet. 24-25.

U.S. at 73), to abrogate state sovereign immunity in enacting GERA. Pet. App. 4a-7a; see *id.* at 17a (O'Scannlain, J., concurring); *id.* at 68a-90a (Paez, J., dissenting) (panel opinion).

Section 2000e-16c is entitled "[c]overage of previously exempt State employees," and extends protection to three categories of employees excluded from Title VII coverage, importing the exclusions almost verbatim. Compare 42 U.S.C. 2000e-16c (employees covered under GERA), with 42 U.S.C. 2000e(f) (employees excluded under Title VII); see also *Board of County Comm'rs* v. *United States EEOC*, 405 F.3d 840, 844 (10th Cir. 2005) (by "echo[ing] the exclusionary language of Title VII," Congress "specifically extend[ed] protections against discrimination * * * to previously exempt high-level state employees"). The newly covered employees are select individuals "chosen or appointed, by a person elected to public office in any State or political subdivision of any State." 42 U.S.C. 2000e-16c(a). GERA thus unequivocally expresses an intent to cover employees "chosen or appointed, by a person elected to public office" in a "State," *i.e.*, state political appointees.

GERA affords these state political appointees the "rights, protections, and remedies provided pursuant to section 2000e-16b of this title." 42 U.S.C. 2000e-16c(a). Those "rights" and "protections" include "personnel actions" "made free from any discrimination" based on "race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title." 42 U.S.C. 2000e-16b(a)(1). GERA further provides that covered state political appointees may file a complaint alleging such "a violation" with the EEOC, 42 U.S.C. 2000e-16c(b)(1), and authorizes the agency to award "remedies as would be appropriate if awarded under

section[] 2000e-5(g)," 42 U.S.C. 2000e-16b(b)(1), including "back pay (payable by the *employer* * * * responsible for the unlawful employment practice)," 42 U.S.C. 2000e-5(g) (emphasis added). And it authorizes the EEOC to award "such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title," 42 U.S.C. 2000e-16b(b)(1), *i.e.*, recovery of compensatory damages "against a *respondent* who engaged in unlawful intentional discrimination," 42 U.S.C. 1981a(a) (emphasis added).

Where the complainant is a state political appointee, the only "employer" "responsible for the unlawful employment practice" and available to pay back pay, and the only "respondent" who could have "engaged in unlawful intentional discrimination" and who is eligible to pay compensatory damages, is the State.[5] See Pet. App. 5a, 7a. As the court of appeals held, "GERA expressly covers state employees, and expressly gives them a right to collect damages 'payable *by the employer*'—the state." *Id.* at 5a (quoting 42 U.S.C. 2000e-5(g)(1)).

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[5] Although individual state officials could technically be defendants to such a suit, at the time Congress enacted GERA it was clear that "backpay as such cannot be awarded against a defendant in his or her individual capacity." *Negrón-Almeda* v. *Santiago*, 528 F.3d 15, 26 (1st Cir. 2008) (citing pre-GERA cases). Thus, by providing for "back pay" "payable by the employer," Congress was authorizing back pay from the State. See, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 & n.8 (1976) (suit against state officials for back pay under Title VII indistinguishable from damages suit against State for Eleventh Amendment purposes). Moreover, the courts of appeals have generally agreed that employees cannot be held liable in their individual capacity under Title VII, the remedial provisions of which are incorporated into GERA. See Pet. App. 74a-75a (Paez, J., dissenting) (panel opinion) (collecting cases).

Thus, when Congress expressly provided that state employees could obtain remedies, including damages, for violations of the statute—violations that could only be committed by state employers—it unequivocally waived state sovereign immunity. "Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages." *Kimel*, 528 U.S. at 74.

c. Petitioner argues to the contrary for three reasons, none of which withstands scrutiny or warrants further review of the decision below.

Petitioner first argues (Pet. 20-21) that "this Court's precedents have required Congress to take one of three paths" to abrogate state sovereign immunity by: (1) expressly providing that it is abrogating Eleventh Amendment immunity; (2) creating a statutory scheme in which states are the only possible defendants; or (3) "specifically defin[ing] States as potential defendants who are subject to suit." That is the same argument made by the dissenting judges, Pet. App. 39a-42a, but this Court's precedents have "required" no such thing. These three means of abrogation may be one way of categorizing the Eleventh Amendment cases previously decided, but this Court has never articulated these as "paths," let alone suggested that they were "required" and exclusive. This Court's precedent requires only that Congress clearly express its intent to abrogate state sovereign immunity in the statutory text, *Kimel*, 528 U.S. at 73-74, a standard GERA satisfies, see pp. 11-13, *supra*.

In any case, states are "the only possible defendants" when the complaining party is a covered state employee seeking back pay. See pp. 12-13, *supra*. And, through incorporation of Title VII provisions, GERA does define States as potential defendants. *Fitzpatrick* v. *Bitzer*,

427 U.S. 445 (1976), which petitioner does not cite, found the "'threshold fact of congressional authorization' to sue the State as employer" to be "clearly present" in Title VII. *Id.* at 448-449 & n.2 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974)); see also *Hibbs*, 538 U.S. at 729-730. This Court held that Congress unequivocally abrogated state sovereign immunity when it amended the definition of "person" to include "governments, governmental agencies, [and] political subdivisions" (42 U.S.C. 2000e(a)); removed the express exclusion of States from the definition of "employer" (42 U.S.C. 2000e(b)); and amended the definition of "employee" to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision" (42 U.S.C. 2000e(f)). *Fitzpatrick*, 427 U.S. at 449 n.2. By extending coverage to "previously exempt [from Title VII] State employees," 42 U.S.C. 2000e-16c, and by otherwise incorporating Title VII provisions, *e.g.*, 42 U.S.C. 2000e-16b(b)(1) (permitting recovery under Title VII's provision permitting back pay "payable by the employer"), Congress's intent to abrogate state sovereign immunity in enacting GERA is particularly clear.

Petitioner next contends that Congress could not have intended to abrogate state sovereign immunity in GERA because "[t]here is no indication that, at the time GERA was enacted, Congress regarded GERA's administrative enforcement scheme"—*i.e.*, proceedings before the EEOC followed by judicial review in which the United States is necessarily a party respondent—"as implicating the States' sovereign immunity." Pet. 23. In other words, Congress could not have "anticipated this Court's decision in *Federal Maritime Commission* [v. *South Carolina State Ports Authority*, 535 U.S. 743

(2002) (*Federal Maritime Commission*)]." Pet. 23. That extra-textual argument is misplaced.

The relevant inquiry under the clear statement rule is not whether Congress anticipated the *Federal Maritime Commission* decision, but whether Congress unequivocally intended to subject States to EEOC administrative proceedings. See, *e.g.*, *Kimel*, 528 U.S. at 76 ("The clear statement inquiry focuses on *what* Congress did enact, not *when* it did so."); *Dellmuth*, 491 U.S. at 239 (Brennan, J., dissenting) (observing that the majority's clear statement rule did not exist at the time Congress enacted the challenged statute). And, as petitioner implicitly concedes, Congress did intend States to be defendants in *EEOC proceedings* brought by covered state employees. Pet. 23 (contending that Congress created an administrative review scheme that "ensured * * * States would *not* be subject to suit in federal court at the behest of private individuals"); Pet. 24 ("Congress sought to avoid the necessity of abrogating immunity by foreclosing direct judicial enforcement without the presence of the United States as a party.").

Moreover, in *Federal Maritime Commission*, this Court simply engaged in common law adjudication; it did not announce new law. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 535-536 (1991) (noting the "declaratory theory of law, according to which the courts are understood only to find the law, not to make it") (citations omitted); *id.* at 549 (Scalia, J., concurring). That this Court could not "imagine" that the Framers "would have found it acceptable to compel a State to" "be required to answer the complaints of private parties * * * before the administrative tribunal of an agency," *Federal Mar. Comm'n*, 535 U.S. at 760, strongly suggests that Congress could have foreseen this result.

Indeed, in the seven years since *Federal Maritime Commission* was decided, Congress has not acted to amend GERA to restrict suits against States.

Finally, petitioner asserts (Pet. 24-25) that GERA is more like the statutes at issue in *Atascadero* and *Dellmuth*, than those at issue in *Kimel* and *Hibbs*. That argument is mistaken.

In *Atascadero*, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, provided a cause of action against "*any* recipient of Federal assistance." 473 U.S. at 245. The Court observed that although States received federal assistance, "given their constitutional role," they "are not like any other class of recipients of federal aid," and thus "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246. In *Dellmuth*, this Court concluded that a provision of the Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*, permitting parties aggrieved by the statutorily-prescribed administrative process "to 'bring a civil action * * * in a district court'" was a "general authorization for suit in federal court" which was not sufficiently clear to abrogate state Eleventh Amendment immunity. 491 U.S. at 228-231 (quoting 20 U.S.C. 1415(e)(2) (1988) and *Atascadero*, 473 U.S. at 246).[6]

In contrast, this Court found Congress's intent "unmistakably clear" where the Age Discrimination in Em-

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[6] Shortly after each decision, both *Atascadero* and *Dellmuth* were superseded by statute. See 42 U.S.C. 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973."); 20 U.S.C. 1403(a) ("A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter.").

ployment Act of 1967 (ADEA), 29 U.S.C. 626(b), directed that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in section[] * * * 216" of the Fair Labor Standards Act of 1938 (FSLA), 29 U.S.C. 216. Section 216(b), in turn, authorized employee actions for back pay "against any employer (including a public agency)," 29 U.S.C. 216(b), and Section 203(x) defined "public agency" as including both "the government of a State or political subdivision thereof" and "any agency of * * * a State or political subdivision of a State," 29 U.S.C. 203(x). *Kimel*, 528 U.S. at 73-74. And, in *Hibbs*, this Court found Congress's intent "not fairly debatable" where the Family and Medical Leave Act of 1993 (FMLA) authorized suit "against any employer (including a public agency)," 29 U.S.C. 2617(a)(2), and defined "employer" to include "any 'public agency' as defined in section 203(x) of this title," 29 U.S.C. 2611(4)(A)(iii), which, in turn, defined "public agency" as including both "the government of a State or political subdivision thereof" and "any agency of . . . a State or political subdivision of a State." *Hibbs*, 538 U.S. at 726 (quoting 29 U.S.C. 203(x)).

As detailed above (see pp. 11-13, *supra*), the provisions of GERA are far more specific than the general authorizations in *Atascadero* and *Dellmuth*, the States are the *only* possible defendants where the complainant before the EEOC is a covered state employee, and GERA expressly incorporates provisions of Title VII which clearly abrogate state sovereign immunity per *Fitzpatrick*. Absent a conflict, further review is not warranted.

2. To validly abrogate state sovereign immunity, Congress must also "act[] pursuant to a valid grant of constitutional authority." *Lane*, 541 U.S. at 517 (quoting

Kimel, 528 U.S. at 73). As this Court recently held in *United States* v. *Georgia*, 546 U.S. 151 (2006), "no one doubts" that Congress has the power to "'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions," and that "[t]his enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States." *Id.* at 158-159. Thus, under *Georgia*, "insofar as [GERA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, [GERA] validly abrogates state sovereign immunity." *Id.* at 159.

In this case, the court of appeals held that Jones and Ward asserted GERA claims that, in substance, alleged violations of the Fourteenth Amendment and, thus, abrogation was valid under *Georgia*. Petitioner does not dispute that holding with respect to the equal pay or sexual harassment claims. It only seeks further review with respect to Ward's claim that the State retaliated against her for publicly supporting Jones's sexual harassment complaint. In that regard, petitioner argues (Pet. 11-19) that the court of appeals erred in holding that Ward's GERA retaliation claim also sounded in the First Amendment, and urges this Court to grant certiorari to resolve the conflict and confusion that has purportedly developed in the three years since *Garcetti* v. *Ceballos*, *supra*, was decided. This case is an unsuitable vehicle to resolve any purported conflict.

a. In *Garcetti*, this Court held that to be protected under the First Amendment, a public employee must have "spoke[n] as a citizen on a matter of public concern," and "that when [a] public employee[] make[s] statements pursuant to [her] official duties," she is not

"speaking as [a] citizen[] for First Amendment purposes." 547 U.S. at 418, 421. If an employee does speak as a citizen on a matter of public concern, the court proceeds to a second inquiry, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* at 418.

"[C]onducting these inquiries sometimes has proved difficult," and such difficulty "is the necessary product of 'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.'" *Garcetti*, 547 U.S. at 418 (quoting *Pickering* v. *Board of Educ.*, 391 U.S. 563, 569 (1968)). These inquiries often involve contested factual issues that can be resolved only upon review of the record developed below. See, *e.g.*, *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242-243 (3d Cir. 2006) (reversing dismissal of public employee's First Amendment retaliation claim because "procedural posture" precluded the appellate court from examining "the content, form, and context of [the] statement, as revealed by the whole record") (brackets in original; citation omitted); *Foraker* v. *Chaffinch*, 501 F.3d 231, 240-241 (3d Cir. 2007) ("proper resolution of challenges to the designation of" speech as within a plaintiff's job duties under *Garcetti* "is to defer to the district court, because * * * '[it] may be in a better position to make the relevant factual determinations'") (brackets in original) (quoting *Freitag* v. *Ayers*, 468 F.3d 528, 546 (9th Cir. 2006), cert. denied, 549 U.S. 1323 (2007)).

The record here is particularly ill-suited for this Court's review. Unlike every other case petitioner cites including *Garcetti*, this case presents no First Amend-

ment claim. Neither Ward nor Jones ever alleged that the Governor's Office retaliated against her in violation of the First Amendment; they alleged retaliation under GERA only. See Pet. App. 12a n.6. The First Amendment inquiry was a product of the sovereign immunity dispute, which led the en banc court of appeals to examine whether the GERA allegations could also state a claim under the First Amendment.

Thus, no agency or lower court has ever reached the merits of the hypothetical First Amendment claim—much less rendered a final judgment on that claim. Nor did the court of appeals itself decide whether Ward could ultimately prevail under the First Amendment, or whether, for example, "Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest." Pet. App. 15a n.7. Indeed, the EEOC has not yet adjudicated the merits of Ward's GERA retaliation claim, *id.* at 12a n.6, let alone any (non-existent) First Amendment claim, and the ALJ determined that factual disputes among the parties could not be resolved "in these early proceedings," *id.* at 109a-111a.

In marked contrast, all of the cases cited by petitioner as purportedly in conflict with the court of appeals decision below (Pet. 14-15), involved plaintiffs that actually alleged First Amendment violations and courts that actually rendered a *final* judgment on that First Amendment claim. See *Gorum* v. *Sessoms*, 561 F.3d 179 (3d Cir. 2009) (affirming summary judgment on First Amendment retaliation claim); *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) (same); *Foraker*, *supra* (affirming judgment as a matter of law after jury verdict on First Amendment retaliation claim); see also, *e.g.*, *Thomas* v. *City of Blanchard*, 548

F.3d 1317 (10th Cir. 2008) (reversing summary judgment and remanding for trial on First Amendment retaliation claim); *Morales* v. *Jones*, 494 F.3d 590 (7th Cir. 2007) (reversing denial of judgment as a matter of law after jury trial and remanding for new trial on First Amendment retaliation claim), cert. denied, 128 S. Ct. 905, and 128 S. Ct. 931 (2008); *Battle* v. *Board of Regents*, 468 F.3d 755 (11th Cir. 2006) (affirming grant of summary judgment on First Amendment retaliation claim).[7]

A true First Amendment case arising from a developed record after final judgment would be a far more suitable vehicle to consider any purported confusion among the courts of appeals in the wake of *Garcetti*.[8] Indeed, as petitioner notes (Pet. 16-17 n.3), there have been (and presumably will continue to be) a number of petitions for certiorari asking the Court to decide this precise question. There is no reason to reach out to de-

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[7] Petitioner also cites *Greenwell* v. *Parsley*, 541 F.3d 401 (6th Cir. 2008), cert. denied, 130 S. Ct. 64 (2009), but that case involved the First Amendment right "to run for political office," *id.* at 402, and does not mention *Garcetti*. In any case, the court of appeals affirmed summary judgment. *Id.* at 404.

[8] Given the fact-intensive nature of the First Amendment inquiry under *Garcetti*, it is unclear to what extent a circuit split or "confusion" (Pet. 15) among the circuits truly exists. In *Fairley* v. *Andrews*, 578 F.3d 518 (7th Cir. 2009), the Seventh Circuit did "disapprove *Alaska* v. *EEOC* to the extent that decision rests on a belief that *Garcetti* applies only to speech expressly commanded by an employer." *Id.* at 523. But the decision below did not rest on such grounds. Rather, the court merely found that Ward's "press conference to protest what she saw as sex discrimination in the Governor's Office" was not part of her official duties. Pet. App. 14a. In any event, to the extent there is disagreement among the circuits regarding application of *Garcetti*, this case is not the vehicle to resolve it.

cide important questions of constitutional law under the First Amendment where, as here, the en banc court of appeals was the first and only adjudicator to address (but not conclusively decide) a hypothetical First Amendment claim.

b. The interlocutory posture of the present case also counsels against granting certiorari on the First Amendment issue.

This Court generally does not grant review of interlocutory decisions because further proceedings may render the relief sought unnecessary. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."), with *United States* v. *Virginia*, 518 U.S. 515, 526, 530 (1996) (review granted after final judgment).

Further proceedings here could obviate any need for this Court to rule on the First Amendment question. On remand to the EEOC, Alaska could prevail on the merits of Ward's GERA retaliation claim (*e.g.*, by showing that Ward failed to make out a prima facie case, or by proving a legitimate, non-discriminatory reason for the termination, Pet. App. 102a), or it could prevail on its laches defense, *ibid.* See *id.* at 98a (EEOC declined to review ALJ's finding that "there are genuine issues of material fact, relating to the laches defense"); *id.* at 109a-111a (ALJ found disputed issues of fact requiring trial on GERA retaliation claim—an issue that was not certified for interlocutory appeal to the EEOC, *id.* at 116a-120a).

Although a State's claim of Eleventh Amendment immunity often warrants an exception to the general

rule against interlocutory review, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-147 (1993), that is not the case here. The reason for the exception is that, generally speaking, a ruling in the State's favor on the Eleventh Amendment question would afford the State immunity from suit in its entirety. *Id.* at 143-144 (purpose of allowing immediate appeal is to "avoid[] the costs and general consequences of subjecting [states] to the risks of discovery and trial"); cf. *Federal Mar. Comm'n*, 535 U.S. at 766 (purpose of sovereign immunity is to "provide[] an immunity from suit"). A ruling in petitioner's favor on the First Amendment question, however, would not confer the benefits interlocutory review is designed to provide.

As noted above (see pp. 7, 18, *supra*), the court of appeals ruled that the pay discrimination claims were based on conduct that would independently violate the Equal Protection Clause, as was the sexual harassment claim. Pet. App. 9a-11a. Relying on this Court's decision in *Georgia*, *supra*, the court of appeals held that Congress had validly abrogated state sovereign immunity with respect to those claims. Petitioner does not challenge that holding. Thus, unless petitioner prevails on its clear statement argument (see pp. 9-17, *supra*), it *will* be required to defend the GERA claims before the EEOC on remand and will *not* be immune from suit. There is no reason to grant certiorari in an interlocutory posture to resolve a factbound constitutional issue when the State will be subject to suit before the EEOC regardless.

This Court confronted a similar situation in *Georgia* itself. There, the State did not dispute that the prisoner had "alleged actual violations of the Eighth Amendment," nor did it challenge the prisoner's suggestion

that the same conduct also alleged violations of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* *Georgia*, 546 U.S. at 157. After determining that Congress validly abrogated state sovereign immunity with respect to claims based on conduct that independently violated the Fourteenth Amendment, this Court remanded for the lower courts to determine "on a claim-by-claim basis" (1) whether the State's alleged conduct violated the statute, (2) whether such alleged conduct also violated the Fourteenth Amendment, and (3) to the extent such alleged conduct violated the statute but not the Constitution, "whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.* at 159; see *Buchanan* v. *Maine*, 469 F.3d 158, 172-173 & n.8 (1st Cir. 2006). Awaiting final judgment in these circumstances does not unduly threaten the State's sovereign interests.

c. Petitioner asserts (Pet. 11, 17-19) that the court of appeals' First Amendment ruling implicates "profound" issues of federalism independently warranting review. But the court of appeals did not rule on the merits of Ward's retaliation claim under the First Amendment. Pet. App. 14a n.7. Indeed, it never reached the second part of the First Amendment inquiry under *Garcetti*—*i.e.*, whether the State "had an adequate justification for treating the employee differently from any other member of the general public." 547 U.S. at 418; see Pet. App. 15a n.7 ("Whether Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest is not at issue here."). This case, therefore, does not foreclose the "ability of the States' highest officials to conduct their affairs and to obtain reliable advice from advisors of their own choos-

ing." Pet. 11; cf. *Davis* v. *Passman*, 442 U.S. 228 (1979) (permitting *Bivens* action charging sex discrimination by congressman to proceed where plaintiff was high-level congressional staffer).

Petitioner also relies heavily on *Cheney* v. *United States District Court*, 542 U.S. 367 (2004) (Pet. 11, 17), and *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (Pet. 18, 20, 24, 27, 28). Both cases are inapposite. *Cheney* involved a judicial discovery order directed at a sitting Vice President personally, as well as separation-of-powers concerns that are not present here. 542 U.S. at 381, 390. *Gregory* considered whether state court judges fell under the ADEA exception for "appointee[s] on the policymaking level," and imposed a clear statement rule in the Tenth Amendment context. 501 U.S. at 467. The principle of state sovereignty is, however, "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," *Hibbs*, 538 U.S. at 727 (quoting *Fitzpatrick*, 427 U.S. at 456), and neither case suggests that this Court should intervene in an interlocutory posture to decide a fact-specific constitutional question that will, in any case, not immunize the State from further proceedings before the EEOC on remand.

3. Reversal of the court of appeals' decision on First Amendment grounds would not afford petitioner relief for another reason: Congress validly abrogated state sovereign immunity in enacting GERA, whether or not the underlying claims sound in the Fourteenth Amendment. That question, however, was not addressed by the en banc majority and has not been considered by any other court of appeals. Review is not independently warranted.

a. To be valid under Section 5, legislation "must exhibit congruence and proportionality between the injury

to be prevented or remedied and the means adopted to that end." *Hibbs*, 538 U.S. at 728 (internal quotation marks and citation omitted).

At the time GERA was enacted, it was well-settled that Title VII validly abrogated state sovereign immunity. *Fitzpatrick*, *supra*; see *Hibbs*, 538 U.S. at 729-730; *id.* at 758 (Kennedy, J., dissenting) ("[T]he abrogation of state sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment."). Like Title VII, the challenged sections of GERA are directed at the central Fourteenth Amendment end of preventing state employment discrimination on the basis of race and sex. By extending the protections of Title VII to previously-excluded state employees, GERA was "the last step in the sequence of broadening Title VII to provide protections to state employees, the intermediate steps of which were explicitly stated by Congress to be based on its Fourteenth Amendment powers." *Board of County Comm'rs*, 405 F.3d at 849.

As this Court explained in *Hibbs*:

> Congress responded to [the history of gender discrimination in employment] by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, and we sustained this abrogation in *Fitzpatrick*. But state gender discrimination did not cease. * * * "[W]omen still face pervasive, although at times more subtle discrimination . . . in the job market." [And], [a]ccording to evidence that was before Congress when it enacted the FMLA [in 1993], States continue to rely on invalid gender stereotypes in the employment context.

538 U.S. at 729-730 (citations omitted); see also *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997) (observing that this Court has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"). Just as the "persistence of such unconstitutional [gender] discrimination by the States justifie[d] Congress' passage of prophylactic § 5 legislation," *Hibbs*, 538 U.S. at 730, in the form of Title VII (*Fitzpatrick*), and the FMLA (*Hibbs*), it also justified Congress's passage of GERA.

The remedies provided in GERA are congruent with and in proportion to the Fourteenth Amendment violations that Congress intended to remedy or prevent. GERA does not require employers to provide any substantive benefit to employees; it merely incorporates the make-whole remedies that are available in Title VII actions against the federal government under Section 2000e-16. Punitive damages are not available against state employers. 42 U.S.C. 2000e-16b(b)(3). Compensatory damages are available only against employers who "engaged in unlawful intentional discrimination," 42 U.S.C. 1981a(a)(1), 2000e-16b(b)(1), and Congress capped liability for such damages at between $50,000 and $300,000, depending on the size of the employer. 42 U.S.C. 1981a(b)(3).

b. Petitioner contends (Pet. 26-27) that abrogation was invalid because, in enacting GERA, Congress failed to create an adequate legislative record detailing a pattern and practice of discrimination against state employees at the policy-making level. That argument is without merit.

This Court has never invalidated, under the congruence-and-proportionality standard, a statute securing rights that this Court's decisions recognize as entitled to heightened protection. Compare, *e.g.*, *Lane*, 541 U.S. at 528-529 (access to courts), *Hibbs*, 538 U.S. at 735 (gender discrimination), and *Fitzpatrick*, *supra* (race and gender discrimination), with *Garrett*, 531 U.S. at 368-372 (disability discrimination), and *Kimel*, 528 U.S. at 89-91 (age discrimination). When a statute targets suspect classifications, "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. In contrast, where Congress targets non-suspect classifications, it "must identify, not just the existence of" discriminatory treatment, but the existence of *unconstitutional* treatment which, applying rational basis review, requires "a 'widespread pattern' of irrational reliance on such [non-suspect classifications]." *Hibbs*, 538 U.S. at 735 (quoting *Kimel*, 528 U.S. at 90).

The purpose of the congruence-and-proportionality test is to "distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue.'" *Hibbs*, 538 U.S. at 728 (quoting *Kimel*, 528 U.S. at 81); *Kimel*, 528 U.S. at 88 (ADEA sought to "effectively elevate[] the standard for analyzing age discrimination to heightened scrutiny"). Legislation fails that test when it targets conduct that does not have "a significant likelihood of being unconstitutional," *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 643-648 (1999) (quoting *City of Boerne*, 521 U.S. at 532), and when the legislation could not "be understood as responsive to, or designed to prevent, *unconstitutional* behav-

ior," *Kimel*, 528 U.S. at 86 (emphasis added) (quoting *City of Boerne*, 521 U.S. at 532). See also *Garrett*, 531 U.S. at 368 (noting failure to demonstrate "history and pattern of *unconstitutional* employment discrimination by the States against the disabled") (emphasis added). In other words, statutes that prohibit "substantially more state * * * decisions and practices than would likely be held unconstitutional under the applicable * * * rational basis standard," *Kimel*, 528 U.S. at 86, are not a valid exercise of Congress's authority under Section 5.

There is no such concern here. In Section 2000e-16b(a)(1), Congress targeted classifications based on race, sex, religion, color or national origin which are subject to strict or heightened scrutiny. *E.g.*, *Johnson* v. *California*, 543 U.S. 499, 505 (2005); *Virginia*, 518 U.S. at 532-533. GERA was enacted as part of the Civil Rights Act of 1991, a statute that Congress found "necessary to provide additional protections against unlawful discrimination in employment," 1991 Act § 2(3), 105 Stat. 1071, and as the "last step" in "broadening Title VII to provide protections to state employees," *Board of County Comm'rs*, 405 F.3d at 849. And Congress enacted GERA at a time when states continued to engage in gender and race discrimination, as this Court readily acknowledged. See pp. 26-27, *supra*. "After Congress has legislated repeatedly in an area of national concern," such as combating race and gender discrimination in employment, "its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

And when Congress targets state action that is presumptively invalid—*i.e.*, state action that infringes on rights subject to heightened constitutional protection—this Court applies a deferential standard of review. *Hibbs*, 538 U.S. at 736. For example, in *Hibbs*, the Court upheld the family *medical* leave provisions of the FMLA as an appropriate means of enforcing the Fourteenth Amendment's prohibition against "gender-based discrimination," based on (a) the "persistence" of unconstitutional gender discrimination that still existed in 1993 (two years after GERA was enacted), (b) evidence of family *parental* leave policies largely from the *private* sector, and (c) evidence of state leave policies drawn from hearings on legislation proposed seven years earlier. *Id.* at 729-736; *id.* at 746-748 (Kennedy, J., dissenting); see also *Lane*, 541 U.S. at 528 (acknowledging that legislative evidence consisted largely of "parenting leave, little of which concerned unconstitutional state conduct"). The same result is warranted here.

Any review by this Court should await a case that squarely presents the issue, as well as further consideration of the question in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2009

Supreme Court, U.S.
FILED
DEC 16 2009
OFFICE OF THE CLERK

No. 09-384

IN THE
Supreme Court of the United States

STATE OF ALASKA, OFFICE OF THE GOVERNOR,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

Perhaps the federal respondents' ("EEOC") dismissal of the profound federalism implications of the en banc Ninth Circuit decision should not be surprising. It is, after all, the same federal government that perceives no federalism problem in reaching legislatively inside the Office of every State Governor to police the Governor's selection and retention of his or her closest policymaking, advisory, and confidential staff. *See* Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. § 2000e-16a *et seq.* Whether the EEOC is ultimately correct that Congress's Section 5 power permitted it, *in 1991*, to deem every gubernatorial staffing decision "presumptively invalid" (Opp. 30) and subject to federal superintendence, without compiling any contemporary substantiating record of constitutional violations is, of course, one of the very questions presented here.

But whether the EEOC is right or wrong on the legal merits of that question, it is profoundly wrong in asserting that the Court's certiorari decision can disregard the profound federalism interests at stake in this case. There is nothing "hypothetical" (Opp. 7, 20, 22) about the abrogation of Alaska's Eleventh Amendment immunity that Congress accomplished here. Nor is there anything "non-existent" (Opp. 20) about an en banc Ninth Circuit decision holding that the First Amendment invests high-level advisors to a Governor with a constitutional claim to retain their confidential positions after conducting press conferences denigrating the Governor.

Indeed, while disregarded by the EEOC, the legal significance of the court of appeals' First Amendment ruling has not been lost on other circuits. The Seventh Circuit has already expressed its "disapprov[al]" of the "official duties" test adopted by the Ninth Circuit here, and agrees with petitioner that the decision creates a conflict in circuit law. *See Fairley v. Andrews*, 578 F.3d 518, 523-524 (7th Cir. 2009) (citing conflicting cases).

Finally, there is no constitutional merit or logic to the EEOC's view that "separation-of-powers concerns" warrant certiorari when preliminary, interlocutory discovery orders intrude on the ability of high-level *federal* officials to obtain confidential advice (Opp. 25), but that the constitutional separation of federal and state powers does not equally warrant this Court's review of a ruling that intrudes in the same way on high-level State officials.

In short, the Ninth Circuit's en banc abrogation of petitioner's Eleventh Amendment immunity on the ground that the First Amendment could compel a Governor to retain on his personal staff an individual who betrays his trust is a double-fisted assault on constitutional federalism and the core autonomy of States that only this Court can halt.

1. a. Tellingly, the EEOC makes no effort to defend the merits of the Ninth Circuit's straitened definition of an employee's "official duties." Nor does it dispute the constitutional importance to governments at every level of the "official duties" test, which marks the line between employee speech that state (and federal) employers can regulate and

private citizen speech that they generally cannot. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

Here, the court of appeals held that the "official duties" line turns formulaically on what an employee's formal job duties "require." Pet. App. 14a. As Judge O'Scannlain explained in dissent, the majority's rule is far too "strict[ ]," Pet. App. 26a, ignoring a multi-factored approach that would consider whether the speech "owe[d] its existence to [Ward]'s professional responsibilities," *ibid.*, or the unique obligations that attend serving on the "policymaking staff in the office of the chief executive of the State of Alaska," *id.* at 25a.

b. The Ninth Circuit's cramped "official duties" rule creates a conflict in the circuits that merits this Court's review. In fact, the Seventh Circuit recently announced its "disapprov[al]" of the Ninth Circuit's rule that "*Garcetti* applies only to speech expressly commanded by an employer," *Fairley*, 578 F.3d at 523, and explained that the Ninth Circuit rule also departs from the "official duties" test applied in the District of Columbia, Sixth, Tenth, and Eleventh Circuits, *id.* at 523-524 (citing *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009); *Haynes v. Circleville*, 474 F.3d 357 (6th Cir. 2007); *Thomas v. Blanchard*, 548 F.3d 1317 (10th Cir. 2008); *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009)); *see also* Pet. 16 (citing additional cases). In particular, the Ninth Circuit's wooden rule that "official duties" consist only of speech formally required by an employer conflicts with rulings in the Third and Fifth Circuits that – like the dissent would have held – factor the source of the employee's information into the "official

duties" analysis. *See* Pet. 14-15 (citing *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007)).

The EEOC attempts to dismiss the conflict (Opp. 21 n.8) by contending that the Ninth Circuit did not limit "official duties" to speech "expressly commanded by an employer," as the Seventh Circuit posited. True, the Ninth Circuit asked whether Ward's complaints were "require[d]" (Pet. App. 14a) rather than "commanded" (*Fairley*, 578 F.3d at 523). But that is no distinction at all. *See ibid.* (explaining that the Ninth Circuit decision is erroneous because "*Garcetti* applies to job requirements that limit, as well as those that *require*, speech.") (emphasis added). The Eleventh Circuit too has flatly rejected the rule adopted by the Ninth Circuit here, explaining that, "[i]f we had examined only whether the employee's official responsibilities *required* them to speak, we would have reached a different result" in prior cases. *Abdur-Rahman*, 567 F.3d at 1284 (emphasis added) (citing, *e.g.*, *Battle v. Board of Regents of the State of Georgia*, 468 F.3d 755 (11th Cir. 2007) (discussed at Pet. 16)); *see also Garcetti*, 547 U.S. at 424-425 ("[T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

Alternatively, the EEOC argues that the courts of appeals' "official duties" inquiries under *Garcetti* can

be fact intensive. Opp. 19, 20. But that is precisely petitioner's point – the Ninth Circuit test is *not* fact intensive. It artificially truncates that factual inquiry. As the Seventh Circuit explained in *Fairley*, 578 F.3d at 523-524, other courts of appeals have adopted a legal definition of "official duties" that considers the totality of the relevant employment facts and circumstances and thus have prescribed the very fact-intensive inquiry that the Ninth Circuit has now foreclosed. The conflict thus is in what facts the law in the different circuits (and this Court) allows to be factored into the "official duties" inquiry. And that is the type of square conflict of law that this Court reviews. *See, e.g., United States v. Arvizu*, 534 U.S. 266 (2002) (granting review and reversing Ninth Circuit rule strictly limiting which facts are weighed in Fourth Amendment "reasonable suspicion" inquiry).

c. The EEOC's central response is to argue repeatedly that the court of appeals' First Amendment ruling was "hypothetical" and "non-existent" (Opp. 7, 20, 22). That will certainly come as news to the en banc Ninth Circuit, which explicitly held that Ward's claim of retaliation for speaking stated not a hypothetical, but an "*actual* violation[ ] of the Fourteenth Amendment." Pet. App. 16a (emphasis added); *see id.* at 15a ("[R]etaliation for this kind of speech violates the First Amendment as incorporated into the Due Process Clause"); *id.* at 15a n.7 ("[W]e merely hold that it *is* a First Amendment claim"); *see also id.* at 21a-22a (O'Scannlain, J., dissenting in part) (Ward's claim "is a prototypical example of an employee's attempt to

'constitutionalize an employee grievance,'" and "opens up a new frontier in this area of constitutional law"); *id.* at 18a (the majority's decision "wrongly enlarges the constitutional implications of employment decisions at the highest levels of state government"). The Seventh Circuit likewise fully appreciated the new constitutional rule created by the Ninth Circuit's en banc ruling. *See Fairley, supra.*

The EEOC emphasizes (Opp. 20) that the Ninth Circuit made its First Amendment ruling in the abrogation context. True enough. But that does not mean the First Amendment ruling was "hypothetical" or "non-existent." Quite the opposite, the presence of the abrogation question means that the Constitution itself mandated that an "*actual* violation[ ]" of the First Amendment be shown. *United States v. Georgia*, 546 U.S. 151, 158 (2006); *see id.* at 159 (abrogation inquiry requires courts to determine whether alleged misconduct "violated the Fourteenth Amendment"). Otherwise, the en banc Ninth Circuit would have been constitutionally obligated to analyze whether GERA is proper prophylactic legislation, which it did not do. *Id.* at 158.

Thus, the EEOC's effort to re-characterize the court's ruling as a non-constitutional GERA decision misses the whole point of *Georgia*'s abrogation inquiry. Under *Georgia*, finding that Ward had actually stated a claim under the Constitution was essential to stripping Alaska of its sovereign immunity and permitting Ward's GERA litigation to go forward. There is nothing hypothetical about a ruling of such constitutional consequence.

d. The EEOC further argues (Opp. 22-24) that certiorari review is unwarranted because of the case's interlocutory posture. But whether petitioner's Eleventh Amendment immunity was constitutionally abrogated is precisely the type of question that merits interlocutory appeal, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and for which this Court routinely grants interlocutory certiorari review, *see, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 514 (2004); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 633 (1999).

The EEOC contends (Opp. 23) that this case is different because petitioner does not seek this Court's review of abrogation for the gender discrimination claims. But the Eleventh Amendment does not impose an "in for a penny, in for a pound" rule of abrogation. To the contrary, "claim-by-claim" determination of Eleventh Amendment immunity is precisely what this Court ordered in *Georgia*, 546 U.S. at 159. To hold that, in so ruling, this Court effectively rolled back interlocutory review for Eleventh Amendment immunity claims would invite plaintiffs to haul States into federal courts or agencies and keep them there for the duration of the litigation as long as the claims for which abrogation is contested are roped together with a single constitutional claim. That threat is real because plaintiffs have commonly challenged employment decisions both on grounds for which abrogation is not available (such as age or disability in employment) and on grounds for which it is available (gender,

race). *See, e.g., Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1216 (11th Cir. 1999) (raising claims under ADA, Rehabilitation Act, and FMLA), *rev'd*, 531 U.S. 356 (2001). And this Court has not hesitated to grant review of the abrogation question on one ground but not on another. *See Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (reviewing only whether Title I of the ADA abrogated sovereign immunity).

Finally, the EEOC argues (Opp. 24) that review can await resolution of Ward's speech-retaliation claim on the merits. But, as this Court explained just seven months ago, enforcing legal barriers to suit against government officials at the motion-to-dismiss stage is critical because of the "heavy costs" that litigation exacts on the work of high-level government officials, who must divert themselves from their duties and "the formulation of sound and responsible policies * * * to participat[e] in litigation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). Thus, when it comes to damages claims against high-level government officials, "it is cold comfort in th[e] pleading context" to say – as the EEOC now does – that the government should trust the discovery and litigation process to vindicate its interests. *Id.* at 1954. Indeed, the Solicitor General argued exactly the opposite when the interests of federal officials were at stake in *Iqbal*. "For some plaintiffs, the opportunity to distract the attention of high-ranking officials in carrying out policies with which they disagree may itself be a strong incentive for filing suit." Petition for Writ of Certiorari, *Ashcroft v.*

Iqbal, 129 S. Ct. 1937 (2009) (07-1015) 2008 WL 336225 at *22. The same is true for the States.

2. With respect to the clarity – or not – of GERA's abrogation of Eleventh Amendment immunity, the EEOC's argument proves Alaska's point.

The EEOC relies on the statutory language for which explicit abrogation was found in the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), *see Kimel, supra*, and the Family and Medical Leave Act, 29 U.S.C. § 2617(a)(2), *see Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). But the language in those statutes went beyond just including States as members of a broad class of potential defendant "employer[s]." In each of those cases, the statute proceeded to define "employer" specifically to include "a public agency," and then defined "public agency" specifically to include the States. *See* ADEA, 29 U.S.C. §§ 216(b) & 203(x); FMLA, 29 U.S.C. §§ 2611(4)(A)(iii) & 203(x).

GERA is very different. It follows the model of the Rehabilitation Act, which simply lumped the States in with a large pool of potential defendant employers. That is not enough, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and the en banc Ninth Circuit's decision to the contrary squarely conflicts with this Court's precedent.

The EEOC's reliance on the abrogation in Title VII recognized in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), overlooks that GERA is a freestanding statute, and not part of Title VII. In fact, when Congress enacted GERA in 1991, it expressly directed that the statute be codified in Title 2, not

Title 42. *See* Pub. L. No. 102-66, Title III, Nov. 21, 1991, 105 Stat. 1088; Pet. 2 & n.1. The codifiers' decision almost a decade later to "reclassify" GERA in Title 42 thus does not amount to explicit textual abrogation by Congress.

Finally, as explained in the petition (at 23-24), the lack of clarity in GERA reflects the unlikelihood that Congress squarely focused on the Eleventh Amendment question because it designed a scheme for administrative rather than direct judicial resolution of claims long before the holding in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), that the States' sovereign immunity extends to such administrative proceedings. The EEOC's response (Opp. 15) that the language shows that Congress intended for States to be sued in that administrative forum is simply wrong. Yes, the language *could be* read to permit such suits. But the critical point for abrogation purposes is that Congress was not *explicit* and, in fact, likely failed to consider the matter because, at the time of GERA's enactment, no court (to petitioner's knowledge) had held that the Eleventh Amendment applied in the administrative setting.

3. Finally, the EEOC asserts (Opp. 25-30) that, because Congress validly exercised its Section 5 power to remedy gender discrimination in some aspects of State employment, *see Fitzpatrick, supra* (Title VII); *Hibbs, supra*, Congress now has free rein to reach further and deeper in its regulation of the States because every State employment decision involving gender is now (and apparently forever) "presumptively invalid" (Opp. 30).

This Court said just the opposite six months ago in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009). The Court ruled that, even for rights "entitled to heightened protection" (Opp. 28), a law that "imposes current burdens * * * must be justified by current needs." *Id.* at 2512. Because of the "substantial federalism costs" of a law like GERA, which "authorizes federal intrusion into sensitive areas of state and local policymaking," neither past authority nor "[p]ast success alone" is "adequate justification to retain," let alone to expand, the reach of federal law. *Id.* at 2511.

Finally, while the EEOC is correct (Opp. 10) that GERA claims against the States have been limited, that simply underscores the lack of necessity for GERA. In any event, because of the abrogation analysis prescribed by this Court in *Georgia*, GERA's impact now reaches further and has spawned an en banc rule of First Amendment law that intrudes profoundly into the core of State governance and regulates on a day-to-day basis the ability of the States' Chief Executives to choose their closest and most confidential staff and advisors. The "official duties" inquiry is a frequently recurring question of great significance to both the States and the federal government. When similarly pressing constitutional concerns striking at the heart of executive power have arisen for the federal government, this Court has granted review notwithstanding the absence of a circuit conflict or frequent recurrence of the issue. Alaska seeks only equivalent consideration for the intrusive and recurring constitutional ruling made by

the en banc court here, which is in direct and now acknowledged conflict with other circuits as well as this Court's precedent.

CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 16, 2009